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IN THE

Supreme Court of the United States

October Term, 1981

DEIL OTTO GUSTAFSON and JOE A. WALTERS,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Do the Fifth and Sixth Amendments permit a court to divorce a criminal defendant from counsel with whom he has established a long-standing and meaningful attorney-client relationship, when the Government moves for disqualification and makes no showing of an actual conflict of interest arising from counsel's former representation of codefendants or potential trial witnesses?

2. Do the Fifth and Sixth Amendments permit a court to deprive a criminal defendant of counsel of choice, solely on the basis of a conclusion that there is a possibility of future conflicts because of successive representation, where there are less burdensome alternatives available?

3. Where the sole basis of a disqualification order is the possibility of future conflicts because of successive representation, are there fair and effectual alternatives to disqualification of counsel which should be implemented by trial courts to benefit generally the administration of criminal justice?

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THE UNITED STATES OF AMERICA,
Respondent.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Deil Otto Gustafson ("Gustafson") and Joe A. Walters ("Walters") hereby petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review judgments of that court entered on April 9, 1982 and May 20, 1982.

OPINIONS BELOW

The first opinion of the United States Court of Appeals for the Eighth Circuit is reported at 675 F.2d 965 (1982). The second opinion of the Court of Appeals, Nos. 82-1576

[1]Other parties to the proceeding in the district court include Roger Frank Newstrum, Ralph Edwin Bruins, James Louis Bacigalupo, Joseph Vincent Agosto and Joan Lorrain Norris.

and 82-1577 (8th Cir. May 20, 1982), is not yet officially reported. Both are set forth in the appendix. A-30 and A-64. Also set forth in the appendix are the two unreported decisions of the United States District Court for the District of Minnesota. A-1 and A-52.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the first panel of the Court of Appeals for the Eighth Circuit was entered on April 9, 1982. After a remand to the United States District Court for the District of Minnesota, the judgment of a second panel of the Court of Appeals was entered on May 20, 1982. This petition for a writ of certiorari is being filed within 60 days of entry of the first judgment. The jurisdiction of the Court to review those judgments is invoked pursuant to 28 U.S.C. § 1254 (1) (1976).

CONSTITUTIONAL PROVISIONS

The constitutional provisions involved are the Fifth and Sixth Amendments to the United States Constitution:

U.S. CONST. amend. V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . .

U.S. CONST. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

On November 5, 1981, a United States grand jury sitting in the District of Minnesota returned an indictment against

Gustafson and five other individuals. The indictment charged Gustafson and the others with misapplication of bank funds, mail fraud, wire fraud and conspiracy. Specifically, it charged that the Tropicana Hotel and Country Club, a Nevada casino in which Gustafson held a minority interest, deposited non-sufficient fund checks in a government Treasury tax and loan account at a bank in St. Paul, Minnesota, owned by Gustafson, and thereby obtained an illegal interest-free loan from the bank. Significant to the instant petition, the substantial questions presented by the indictment do not revolve around factual disputes with respect to the transactions underlying it, but rather involve issues as to whether these transactions constitute a violation of any criminal law. Because of the unique nature of Treasury tax and loan accounts, the requirements imposed upon banks which handle these accounts, and the corresponding safeguards provided to these banks by the Department of Treasury, Gustafson and the others all legitimately contend that no fraud could possibly have been worked against the bank. Thus, it has been and remains the position of each that no criminal law has been violated.

During the lengthy grand jury investigation, for a period of nearly two years, Walters represented Gustafson, two of his codefendants, Roger Frank Newstrum and Ralph Edwin Bruins, and certain of Gustafson's employees when they were subpoenaed to produce documents before the grand jury. After the indictment was returned, Gustafson's codefendants retained other counsel, while Walters entered an appearance on Gustafson's behalf. On November 23, 1981, the Government filed a motion for an inquiry concerning possible conflicts of interest of certain defense counsel, in response to which a hearing was conducted by

the district court. The hearing produced no evidence of an actual or anticipated conflict between Gustafson and his codefendants and during the hearing, Gustafson professed his strong desire to have Walters continue to represent him. Nevertheless, in an order entered on December 29, 1981 (A-1), the district court disqualified Walters from further representation of Gustafson.

On April 9, 1982, a panel of the Eighth Circuit reversed and remanded the December 29, 1981 decision of the district court. A-30. The panel, in an opinion by Judge Heaney, concluded that the important goals of the Sixth Amendment and Rule 44(c), "[extend protection] to the selection of retained counsel" and that "the chosen method of dealing with a potential conflict . . . is the one which will alleviate the effects of the conflict while interfering the least with defendant's choice of counsel." A-36-37. It concluded that counsel's "former representation of grand jury witnesses presents the very remote possibility of a conflict, insufficient to warrant the disqualification of defendant Gustafson's attorney of choice." A-41. With respect to the codefendants, the district court was ordered to conduct a further inquiry concerning the existence of adversity of interest between Gustafson and his codefendants and, if the district court found a "clear showing" of adversity, it was ordered "to consider whether there exists a means of eliminating the potential conflict less burdensome than disqualification." A-44.

With respect to a suggestion made by Gustafson that he was willing to retain backup counsel to cross-examine codefendants and do whatever else necessary to eliminate any conflict which might arise, as *one* less burdensome alternative to disqualification, the district court was ordered to

"inquire of defendants Newstrum and Bruins as to their willingness to consent to Walters' continued representation of Gustafson, and use of backup counsel." A-44. Since the panel found that any consent would "in effect waive any future objections they may have to the fairness of their trial arising as a result" of this procedure, the consent was required to "fulfill all the standards of a knowing and intentional waiver of a constitutional right." *Id.*[5]

On May 10, 1982, the district court conducted a brief hearing during which it perfunctorily examined the attorneys for Gustafson's codefendants in open court and codefendants and their attorneys *in camera*. In open court, the attorneys for codefendants each stated that his client had no objection to Walters' continued representation of Gustafson or to Gustafson's retention of backup counsel. Both indicated their view that they did not have standing to interefere with Gustafson's Sixth Amendment right to counsel of choice. However, both refused to waive any of his client's rights or privileges, including the broad constitutional right to a fair trial.

Thereafter, the district court entered an oral order, finding a clear showing of an adversity of interest between Gustafson and his codefendants. Rejecting the suggestion of both Bruins and Gustafson that severance of Gustafson from codefendants and separate trial would be a less burdensome alternative than disqualification, the district court disqualified Walters by its oral order. After hearing a formal motion for severance from Gustafson, the district court entered a written order rejecting sever-

[5]A waiver of Gustafson's Sixth Amendment rights in connection with the proposal to use backup counsel was also required by the April 9, 1982 decision. A-45-46. This waiver was submitted to the district court in affidavit form during a May 10, 1982 hearing.

ance and disqualifying Walters on May 17, 1982. A-52. This May 17, 1982 order was affirmed by order of a panel of the Eighth Circuit entered on May 20, 1981. A-64. That panel concluded that "a potential conflict arises from confidential communications between Walters and defendants Bruins and Newstrum during the period of concurrent representation." A-65.

On June 2, 1982, Gustafson and Walters petitioned the Eighth Circuit for a rehearing and a rehearing *en banc*, with respect to the April 9, 1982 and May 20, 1982 decisions of that court. That petition has not yet been ruled upon by the Eighth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

The Decisions Of The Court Of Appeals For The Eighth Circuit Raise Important Constitutional Questions Which Should Be Settled By This Court Without Delay Because Their Resolution Would Benefit Generally The Administration Of Criminal Justice.

This petition presents questions involving a criminal defendant's right to choice of counsel under the Fifth and Sixth Amendments, questions involving what principles and requirements should guide federal courts in ruling on Government motions to disqualify counsel in criminal proceedings, and questions as to whether there are fair and effectual alternatives to disqualification of counsel which would protect the constitutional rights of all parties before the court, while reducing the expenditure of judicial resources on appeals from disqualification orders. Each of these areas is a matter of continuing concern to the lower

federal courts and to this Court.[3] Yet, in determining whether to address these issues of general importance, this Court should not lose sight of the very individual rights and interests which could be irreparably lost if the ultimate relief sought is denied. Given the background to this matter, it should be evident that Gustafson would suffer actual and severe prejudice if deprived of counsel of choice at this stage of the proceedings.[4]

This Court has very recently granted certiorari in the case of *Slappy v. Morris*, 649 F.2d 718 (9th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3783 (U.S. Mar. 29, 1982) (No. 81-1095), to address the question of whether the Sixth Amendment entitles a criminal defendant to demand continued representation by a particular public defender who had represented him earlier in the proceedings and with whom he had developed a relationship of trust and confidence. This petition presents a related question of whether the Sixth amendment entitles a criminal defendant to continued representation by retained counsel in the face of a Government motion to disqualify because of the possibility of conflicts arising due to counsel's former represen-

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[3]The *amicus curiae* brief filed on behalf of the National Association of Criminal Defense Lawyers and the California Attorneys for Criminal Justice in support of defendants' initial appeal attests to the common interest of criminal defendants and the bar in the issues presented herein.

[4]It is significant that in granting two extensions to the time limits of the Speedy Trial Act, the district court has found that this matter is:

> unique and complex in that the nature of the prosecution involves proof of facts existing in many jurisdictions over a three year period ending several years ago . . . [involves] a lengthy series of transactions the details of which require substantial and intensive investigation . . . and [involves] the existence of novel questions of fact and law that make it impossible for the parties to adequately prepare for both pretrial proceedings and the trial itself within the time limits established by [the Speedy Trial Act].

May 11, 1982 District Court Order.

tation of codefendants. It is of at least equal importance and has not been resolved by this Court's previous decisions.

That the instant matter presents an issue of a criminal defendant's constitutional rights to counsel of choice in the context of a decision on a motion to disqualify accentuates the importance of this petition. In recent years there has been a proliferation of motions to disqualify litigants' counsel on the basis of claims of potential conflict, which has resulted in vastly different approaches in the federal courts.

Illustrative of one approach are *United States v. Laura*, 607 F.2d 52 (3d Cir. 1979); *United States v. Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975); *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 658 F.2d 1355 (9th Cir. 1981); *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020 (5th Cir.), *cert. denied*, 102 S.Ct. 394 (1981); *In re Special February 1977 Grand Jury*, 581 F.2d 1262 (7th Cir. 1978); *In re Taylor*, 567 F.2d 1183 (2d Cir. 1978); *In re Grand Jury Empaneled January 21, 1975*, 536 F.2d 1009 (3d Cir. 1976); and *In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600 (D.C. Cir. 1976). Generally in these cases the courts declined to disqualify counsel on the basis of only a showing of potential conflict, particularly in criminal cases where constitutional rights were implicated.

In contrast are such decisions as *United States v. Provenzano*, 620 F.2d 985 (3d Cir. 1980); *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978) *United States v. Vargas-Martinez*, 569 F.2d 1107 (9th Cir. 1978); *United States*

v. Ostrer, 597 F.2d 337 (2d Cir. 1979); *In re Investigation Before February 1977 Lynchburg Grand Jury*, 563 F.2d 652 (4th Cir. 1970); *In re Gopman*, 531 F.2d 262 (5th Cir. 1976); and *In re Grand Jury Investigation*, 436 F.Supp. 818 (W.D. Pa. 1977), *aff'd per curiam by equally divided court*, 576 F.2d 1071 (3d Cir. 1977) (en banc), *cert. denied*, 439 U.S. 953 (1978), where the courts with little or no greater showing of actual or potential conflict reached a contrary result.

The sharply differing approaches of these decisions reflect the uncertainty and conflict among the circuits and demonstrate the need for this Court to establish firm principles to guide the lower courts.

Moreover, the sheer number of appeals which have flooded the appellate courts should by itself compel this Court to set down clear rules which can be applied generally in resolving the increasing number of disqualification motions. It is widely recognized that motions to disqualify have become "common tools of the litigation process, being used . . . for purely strategic purposes." *Allegaert v. Perot*, 565 F.2d 246, 251 (2d Cir. 1977); *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976). The recent decision of *Firestone Tire & Rubber Co. v. Risjord*, 440 U.S. 368 (1981), holding that "a district court's order denying a motion to disqualify counsel is not appealable under § 1291 prior to final judgment," reflects an effort by this Court to stem the growth of interlocutory appeals of orders on disqualification motions, at least in the civil context where the motion is denied.

One circuit, the Ninth Circuit in *United States v. Greger*, 657 F.2d 1109 (9th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3607 (U.S. Jan. 19, 1982) (No. 81-13-

57), has concluded that the reasoning of *Firestone* is equally applicable to an order granting disqualification in the context of a criminal proceeding.[5] However, that decision was based upon a predicate that any error in such an order would be corrected without problem on a final appeal because "if the order can be shown to have been erroneous, prejudice will be presumed." *Id.* at 1113. The *Greger* approach to the proliferation of appeals of disqualification orders, however, is short-sighted because in recognizing and relying upon a presumption of prejudice, it totally defeats the interest of the Government in immunizing any conviction from collateral attack on final appeal—an interest which, for example, was given recognition by the passage of Rule 44(c), Fed.R.Crim.P., applicable to joint representation of codefendants at trial.[6]

The *Greger* approach is simply not a satisfactory alternative to this Court's articulation of a clear set of prin-

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[5] *But see, In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, supra* at 1397 (citation omitted), decided twelve days after *Greger*, in which the Ninth Circuit found the grant of a disqualification motion appealable, stating in part:

> [A disqualification order] is not, as a practical matter, subject to reconsideration from time to time, because once a person's chosen attorney has been barred from representing that person, the person must then and there materially change his or her position in retaining another attorney, or choosing to forego representation. . . The effect here is immediate and conclusive.

[6] Similarly, the Eighth Circuit's willingness in this matter to disqualify counsel based solely upon a "potential conflict" exposes any conviction to collateral attack. Where there has only been a finding of potential conflict and defendant has been required to go to trial without his counsel of choice, if at trial no actual conflict develops between defendant and his codefendants and yet convictions are obtained, defendant could mount a successful attack on that conviction, particularly if prejudice is presumed. Yet prejudice must be presumed where a fundamental constitutional right has been impaired on the basis of speculation which in retrospect was unfounded. As this Court has concluded, "the assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978), *quoting Chapman v. California*, 386 U.S. 18, 23 (1967).

ciples and requirements to guide the district courts in their consideration of disqualification motions in criminal proceedings. By granting certiorari in this matter this Court would have the opportunity to correct the errors of constitutional dimension in the lower courts' decisions, to fully consider the alternatives to disqualification put forth by petitioners, and to establish firm principles and requirements which will avoid conflicting decisions in the future and effectively stem the tide of appeals of disqualification orders

II.

The Court Of Appeals For The Eighth Circuit Erred When, In Effect, It Adopted A Per Se Rule That In Situations Of Successive Representation The Potential Of Future Conflicts Automatically Warrants Disqualification.

In many significant respects petitioners are in full agreement with the Eighth Circuit's original April 9, 1982 decision. The decision recognized that the Sixth Amendment protects "a criminal defendant's selection of retained counsel" and reaffirmed the principle that, "[i]n general defendants are free to employ counsel of their own choice and the courts are afforded little leeway in interfering with that choice." A-34. *See, United States v. Cox*, 580 F.2d 317, 321 (8th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979); cf. *Faretta v. California*, 422 U.S. 806 (1975).[7]

[7]The courts have consistently recognized that the Sixth Amendment right to assistance of counsel subsumes the right to be represented by an attorney of one's choice. *See e.g., United States v. Valenzuela*, 521 F. 2d 414, 416 (8th Cir. 1975), *cert. denied*, 424 U.S. 916 (1976); *United States v. Mahar*, 550 F.2d 1005 (5th Cir. 1977); *United States ex rel. Carey v. Rundle*, 409 F.2d 1210, 1215 (3rd Cir. 1969), *cert. denied*,

The decision recognized the significant differences between "multiple representation [where an attorney simultaneously represents two or more defendants]" and "successive representation [where an attorney representing a defendant has previously represented codefendants or trial witnesses]." A-36. It recognized that, in this matter, there had been no "clear showing that the present and former clients' interest are adverse" so as to justify disqualification of counsel in a criminal context. A-43. Finally, the decision correctly required that "the chosen method of dealing with a potential conflict, in the absence of an acceptable waiver, is the one which will alleviate the effects of the conflict while interfering the least with defendant's choice of counsel." A-37.

Petitioners do, however, sharply disagree with the reasoning of the April 9, 1982 decision as applied to the proposal made in this proceeding that Gustafson was willing to retain backup counsel to alleviate even the possibility of future conflicts. Petitioners submit that by engrafting onto the alternative of backup counsel a requirement that Gustafson's codefendants waive their constitutional rights in connection therewith; and by allowing the district court, on remand, to treat codefendants' refusal to waive their constitutional rights as a clear showing of the potential of adversity, the appellate court defeated the very principles it announced in its original decision.

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397 U.S. 946 (1970); *United States v. Sheiner*, 410 F.2d 337, 342 (2d Cir.), *cert. denied*, 396 U.S. 825 (1969); *United States v. McMann*, 386, F.2d 611, 618 (2d Cir. 1967), *cert. denied*, 390 U.S. 958 (1968); *Releford v. United States*, 288 F.2d 298, 301 (9th Cir. 1961). The right to counsel of choice also stems directly from the Fifth Amendment. *United States v. Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); *In re Taylor*, *supra* at 1186 n.5 (2d Cir. 1978).

By requiring codefendants to waive their constitutional rights in connection with the proposal to use backup counsel, the court below defeated the whole purpose of the proposal—which was to assure that codefendants' rights would remain protected. Under the proposal, it was Gustafson who was to waive his constitutional rights in connection with the use of backup counsel and who was to bear the full burden of how the proposal would be implemented by the district court as the trial progressed—*i.e.*, whatever strictures the district court placed upon the use of backup counsel to protect codefendants' rights would be a risk that would be accounted for in Gustafson's waiver. To require codefendants to waive all of their constitutional rights before the fact, struck out the very heart of the proposal and fundamently destroyed its merits as a response to only the *potential* of conflict.

By forcing codefendants to waive rights and consent to a procedure over which they would then have no control, the court of appeals dictated the foregone conclusion that the proposal could not be accepted by codefendants. Thus, in requiring this, the appellate court effectively rejected a solution which could have had general application in alleviating the problem of possible future conflicts presented in successive representation situations. Of even more significance, the appellate court effectively adopted a *per se* rule that in situations of successive representation the possibility of future conflicts will automatically warrant disqualification.

Such a *per se* rule is inconsistent with the decisions of this Court which, in considering whether a defendant's Sixth Amendment right to effective assistance of counsel has been abridged by joint representation, require a show-

ing of actual conflict of interest. *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980); *Holloway v. Arkansas*, *supra* at 485-86; *Glasser v. United States*, 315 U.S. 60, 72-75 (1942). It is directly in conflict with the decisions of other circuits which, in cases of successive representation, reject a *per se* standard of disqualification where there is only the potential of conflict. *See e.g.*, *United States v. Jeffers*, 520 F.2d 1256 (7th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976); *United States v. Armedo-Sarmiento*, *supra*; *United States v. Garcia*, *supra*; *cf. United States v. Young*, 644 F.2d 1008 (4th Cir. 1981); *United States v. DiCarlo*, 575 F.2d 952 (1st Cir.), *cert. denied*, 439 U.S. 834 (1978).[8]

Likewise, it is even in conflict with the recently adopted Rule 44(c), applicable only to multiple representation of defendants at trial, which implicitly assumes that joint representation may be permissable and, thus too, eschews a *per se* approach.

The general or *per se* rule effectively adopted by the Eighth Circuit in this matter because of the end result of its decisions cannot be allowed to stand against the substantial constitutional rights involved.

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[8]A number of district courts have followed this approach and have refused to disqualify counsel in successive representation cases. *See e.g.*, *United States v. Linton*, 502 F.Supp. 871 (D. Nev. 1980); *United States v. FMC Corp.*, 495 F.Supp. 172 (E.D. Pa. 1980); *United States v. RMI Co.*, 467 F.Supp. 915 (W.D. Pa. 1979); *United States v. Horak*, 465 F.Supp. 725 (D. Neb. 1979).

III.

The Failure Of The Court Of Appeals To Require Adoption Of Less Burdensome Alternatives To Disqualification Of Counsel Is An Error Of Constitutional Dimension With Adverse Implications For The Entire Criminal Justice System.

Petitioners submit that the analysis and conclusion of the April 9, 1982 decision, that "the chosen method for dealing with a potential conflict . . . is the one which will alleviate the effects of the conflict while interfering the least with defendant's choice of counsel," is unassailable and is compelled by consistent authority which requires that where constitutionally protected rights are involved, the government must adopt the least restrictive alternative to meeting its end. *See, e.g., Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *United States v. Robel*, 389 U.S. 258, 265 (1967).[9]

Petitioners have suggested three possibilities which could be implemented: (i) retention of backup counsel, (ii) severance of defendant from codefendants for purposes of trial and (iii) waiver of Gustafson's Sixth Amendment rights. Implementation of one of these alter-

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[9]Particularly where the constitutional right is a criminal defendant's right to counsel, other governmental interests must giveway to the paramount constitutional interest. *Geders v. United States*, 425 U.S. 80, 91 (1976) ("the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel"); *cf. United States v. Nixon*, 418 U.S. 683, 711-13 (1974) (presidential interests in confidentiality cannot prevail over fundamental demands of due process of law); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 267 (1974) (governmental interest in administrative efficiency not sufficient to overcome constitution right); *Shapiro v. Thompson*, 394 U.S. 618, 633-38 (1969) (governmental interests in cost savings and efficient administration of government not sufficient to overcome constitutional right); *Koetteakos v. United States*, 328 U.S. 750, 773 (1946) (governmental interest in convenience and efficiency not sufficient to overcome defendant's individual rights).

natives would have been fully consistent with the April 9, 1982 decision, would have protected Gustafson's rights, and yet would have avoided the very substantial risk now presented of defendant's collateral attack of any conviction. The district court rejected the first two proposals without careful consideration and then failed to provide Gustafson an opportunity to waive his Sixth Amendment rights. This was, within three days, affirmed by the court of appeals without permitting Gustafson to fully brief the merits of his appeal.

Backup counsel is a recognized method for dealing with the potential of conflict. *See United States v. Jeffers, supra* at 1266. Indeed, one commentator has suggested that a court which is faced with an *actual* conflict prior to trial "might appoint standby counsel to assist the court in minimizing the effect of conflict." Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 Geo. L.J. 1075, 1115 (1979). That commentator found support for such a solution in *United States v. Dougherty*, 473 F.2d 113 (D.C. Cir. 1972), *cited with approval in Faretta v. California, supra* at 834 and n.46 (example of court's power to use standby counsel to assist *pro se* defendant).

Likewise, severance is an acknowledged method for avoiding the potential of conflicts. *See e.g., Cuyler v. Sullivan, supra* at 347 ("[t]he provision of separate trials for Sullivan and his codefendants significantly reduced the potential for a divergence in their interests"). Severance is also a method for protecting a criminal defendant's right to counsel of choice. *See, e.g., United States v. Seale*, 461 F.2d 345, 358 (7th Cir. 1972) (severance and continuance appropriate to vindicate right to counsel of choice).

Furthermore, persuasive authority indicates the availability of severance as a less burdensome alternative to disqualification. Thus, in *Case v. North Carolina*, 315 F.2d 743 (4th Cir. 1963), the Fourth Circuit held a refusal to permit severance, based on claims that defendant's counsel had previously represented a codefendant and that a conflict would arise between their interests at trial, to be reversible error. Similarly, in *United States v. Gougis*, 374 F.2d 758 (7th Cir. 1967), the Seventh Circuit concluded that where codefendants had conflicting interests and yet were jointly represented by court-appointed counsel, their trial constituted improper joinder under Rule 14. Quoting *Schaffer v. United States*, 362 U.S. 511 (1960), for the principle that a trial court is under a continuing duty to grant a severance if prejudice does appear, the Seventh Circuit held that "a misjoinder as to defendant Gougis existed" and ordered a separate trial. 374 F.2d at 762. More recently, in *United States v. Mardian*, 546 F.2d 973 (D.C. Cir. 1976), the District of Columbia Circuit Court held it reversible error not to grant a motion for severance where a defendant's counsel had become ill after two weeks of trial and where the defendant had previously made some showing of prejudice in a joint trial.

The district court and the second decision of the court of appeals responded to Gustafson's suggestion that severance was a less burdensome alternative by essentially concluding that severance would not completely cure the concerns presented. However, any realistic comparison of the concerns presented by disqualification of counsel—including the paramount concern of impairment of fundamental constitutional rights—with the minimal concerns that would remain after severance and separate trials for

defendants, constitutionally compels the latter less burdensome alternative. Particularly, in situations of successive representation where defendants will be represented by separate counsel at trial and where even in the context of a joint trial, only the potential of future conflict arising has been found, the additional measure of separate trials will guarantee that this potential cannot ripen into an actual conflict.

In *Cuyler v. Sullivan, supra,* a first degree murder case where the same attorneys represented three defendants at separate trials, this Court found that defendant had failed to show "his counsel actively represented conflicting interests" so as to establish the constitutional predicate for a claim of ineffective assistance. 446 U.S. at 350. Separate trials in the circumstances of this matter would guarantee a similar result.

Finally, the lower court's focus on the waiver of the rights of Gustafson's codefendants averted their attention from Gustafson's absolute right to waive his rights to effective assistance of counsel—a right which Gustafson was not given an effective opportunity to exercise. The April 9, 1982 decision of the court of appeals recognized three problems which might arise in a successive representation situation: (i) an attorney might use confidential information to impeach a former client, (ii) an attorney might fail to conduct a rigorous cross-examination of a former client to avoid misusing confidential information, and (iii) an attorney might make trial decisions which would avoid prejudice to a former client in order to attract future business from the former client. A-38-39. The first problem would prejudice the former client; the other two would prejudice the present client. The April 9, 1982 decision also recognized that, "[a] facet of the right to counsel of choice is the

defendant's ability to waive his right to the assistance of counsel unhindered by a conflict of interest, provided that waiver is knowing and intelligent". A-34-35. *Accord, Holloway v. Arkansas, supra* at 483 n.5; *Glasser v. United States, supra* at 70; *United States v. Lawriw*, 568 F.2d 98, 104 (8th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978).

Petitioners have contended that backup counsel should solve the problem of any potential conflict and Gustafson has, at the suggestion of the court of appeals, waived his Sixth Amendment rights in connection therewith insofar as those rights may be impinged upon by the need to employ backup counsel to alleviate potential conflicts. However, if backup counsel and severance for trial are not found to be effective solutions, at the very least Gustafson should be given an opportunity to make a knowing and intentional waiver of his Sixth Amendment rights in connection with Walters' continued representation—which standing alone would be an effective solution. *United States v. Armedo-Sarmiento, supra* at 592-93.

Of the three potential problems in Walters' successive representation delineated by the Eighth Circuit, the second and third present no possibility of prejudice to codefendants, but only potential prejudice to Gustafson. Gustafson's right to counsel of choice requires that he be permitted the opportunity to waive any right which he might have and which might be prejudiced by any conflict attorney Walters might have. Gustafson must also be permitted the opportunity to waive his right with respect to the first problem as well. Such a waiver would permit the district court to protect codefendants' rights by permitting each to claim his attorney-client privilege if he should testify at a joint trial and by denying Walters the opportunity to cross-examine. This would protect the privilege of Gustafson's

codefendants and yet would permit Gustafson to exercise his right to counsel of choice. The end result of the decisions of the lower courts has been to deny Gustafson his Sixth Amendment right to counsel of choice by denying him the opportunity to make such a waiver. This must be rectified by this Court's review.

CONCLUSION

In order to vindicate Gustafson's Fifth and Sixth Amendment rights and to give this Court the opportunity to require the adoption of fair and effectual alternatives to disqualification and the constantly increasing number of appeals from Government motions to disqualify criminal defendants' counsel, Petitioners submit that this Court should grant their petition and issue a writ of certiorari to review the judgments and opinions of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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June 8, 1982

APPENDIX

APPENDIX

United States District Court
District of Minnesota
Third Division

United States of America,

Plaintiff,

v.

Joseph Vincent Agosto, Deil Otto Gustafson, Roger Frank Newstrum, Ralph Edwin Bruins, James Louis Bacigalupo, and Joan Lorrain Norris,

Defendants.

Cr. 3-81-96

Memorandum, Findings of Fact, Conclusions of Law, Order

James M. Rosenbaum, United States Attorney, Douglas A. Kelley, Thorwald H. Anderson, Assistant United States Attorneys, Mineapolis, Minnesota, attorneys for plaintiff.

Stanley I. Greenberg, Los Angeles, California, Peter J. Thompson, Minneapolis, Minnesota, attorneys for defendant Agosto.

Joe A. Walters, O'Connor & Hannan, Minneapolis, Minnesota, attorney for defendant Gustafson.

Gordon G. Busdicker and Jerry W. Snider, Faegre & Benson, Minneapolis, Minnesota, attorneys for defendant Newstrum.

Joseph S. Friedberg and Mark W. Peterson, Minneapolis, Minnesota, attorneys for defendant Bruins.

Steven Z. Kaplan and James W. Littlefield, Briggs & Morgan, St. Paul, Minnesota, attorneys for defendant Bacigalupo.

Stephen Stein, Goodman, Oshins, Brown & Singer, Las Vegas, Nevada, and Douglas W. Thomson, St. Paul, Minnesota, attorneys for defendant Norris.

In this recently filed criminal prosecution against six defendants alleging a total of 113 counts of conspiracy, misapplication of bank funds and mail and wire fraud, the government has moved, pursuant to Rule 44(c), Fed. R. Crim, P., for a hearing to determine whether counsel for four of the defendants have an actual or potential conflict of interest and, if so, to order appropriate relief. The government urges that Joe A. Walters, Stephen Stein, Stanley I. Greenberg and Steven Z. Kaplan be disqualified.

The present legal representation of each defendant is as shown in the listed appearance above. The government claims, and defendants do not deny, that each of the following named attorneys now or previously represented in this case the defendants and witnesses named below and that each of the witnesses appeared before the Grand Jury and that each will be called by the government at trial:

Attorneys	Clients
1. Joe A. Walters	Defendants: Gustafson Newstrum Bruins
	Philip Williams, accountant for Gustafson Corporations.
	Robert Hildreth, accountant for Gustafson Corp. at Tropicana
	Dwain Johnson, C.P.A. who prepared Gustafson's tax return.
	Jane McClean, employee of Gustafson who handled checks.
	Helen Sundberg, Gustafson's personal secretary.
	Gary Talbot, bookkeeper for Gustafson.
2. Stephen Stein	Defendants: Norris Agosto
	Michael Tanno, General Manager of Tropicana
	Albert Bardier, accountant for Production and Leasing, Ltd. owned by Agosto.
	Mitzi Briggs Smith, one time 80% owner of the Tropicana.

		Harold Hug, comptroller of the Tropicana.
		Jay Brown, law partner of Stein.
3.	Stanley I. Greenberg	Defendants: Agosto Norris
		Albert Bardier, accountant for Production and Leasing, Ltd. owned by Agosto.
4.	Steven Z. Kaplan	Defendants: Bacigalupo
		Victoria Peterson, Summit Bank bookkeeping supervisor.
		Ula Hall, Summit Bank auditor.
		Barbara Morrow, Summit Bank vice president.

Rule 44(c) became effective on December 1, 1980, and established a procedure for avoiding the occurrence of events which might otherwise give rise to a plausible post-conviction claim that because of multiple representation the defendants in a criminal case were deprived of their sixth amendment right to the effective assistance of counsel. The new rule requires the court to take "such measures as may be appropriate to protect" a defendant's sixth amendment right to counsel "unless it appears that there is good cause to believe no conflict of interest is likely to arise."

In addition to the authority granted by this rule, the dis-

trict courts are responsible for the supervision of members of their bars. *Fred Weber, Inc. v. Shell Oil Co.*, 455 F.2d 602, 605 (8th Cir. 1977). *cert. denied*, 436 U.S. 905 (1978); *Central Milk Producers Co-op v. Sentry Food Stores*, 573 F.2d 988, 992 (8th Cir. 1978). The district courts are authorized to disqualify attorneys from representing defendants in criminal cases where such representation would violate of the Code of Professional Responsibility. *Coffelt v. Shell*, 577 F.2d 30 (8th Cir. 1978). The district courts are encouraged "to strictly enforce the Code of Professional Responsibility." *Central Milk Producers Co-op v. Sentry Food Stores*, 573 F.2d at 993.

The issue here is whether the multiple representations attempted by Joe A. Walters, Stephen Stein, Stanley I. Greenberg and Stephen Z. Kaplan occasion a conflict of interest, or likely future conflict of interest, which will deprive any of the defendants of effective assistance of counsel under the sixth amendment, or whether disqualification is required because of violations of the Code of Professional Responsibility. The court held hearings on November 25 and December 16, 1981 and personally advised each defendant as to his right to effective assistance of counsel. Statements and briefs were filed. Counsel were heard and each submitted proposed findings.

Joe A. Walters - Deil Gustafson

Attorney Walters currently represents defendant Deil Gustafson. Gustafson, through various holding companies, formerly owned a substantial interest in the Tropicana Hotel and Country Club (Tropicana). He also owns the Summit National Bank of St. Paul and the Summit National Bank of Richfield. At various times, he has served as

president of the St. Paul bank, and chairman of the board of both banks.

During the grand jury investigation and until after the arraignment in this case, Walters also represented defendant Roger Newstrum, an officer and employee of various Gustafson-owned companies, and at various times, a corporate officer of the Tropicana and vice president and director of the Richfield bank. Until the indictment, Walters also represented defendant Ralph Bruins, who was president and a director of the Richfield bank and a consultant to the St. Paul bank.

In addition to these three defendants, during the grand jury investigation, Walters represented six other Gustafson employees who were either called as witnesses by the grand jury or interviewed by the Federal Bureau of Investigation (FBI). The government has stated these witnesses will be called by the government during trial. and that their testimony will establish the link between defendants Gustafson and Agosto in diverting moneys from the Summit Banks to the Tropicana by the scheme charged in the indictment. The legal fees of all the aforementioned defendants and witnesses represented by Walters are being paid by the Summit Banks.

Gustafson has submitted two affidavits to this court in connection with this motion, and was sworn and testified at the hearing of December 16, 1981. He has expressly declined to attempt to waive his sixth amendment right to effective assistance of counsel.

He states that, based upon his own knowledge and discussions with his attorney, he believes there are no current conflicts arising out of Walter's prior representation of his codefendants and the government witnesses.

Specifically, Gustafson takes the position that there is no inconsistency between his defense and that of his codefendants.

The government contends, however, that there is a strong likelihood of inconsistency in the defenses of these individuals. According to the government, Gustafson has asserted through counsel that he was unaware that the relevant checking accounts of the Tropicana were at his banks. The government believes it can prove that Bruins and Newstrum were involved in the allegedly unlawful transactions that are the subject of the indictment. This, the government contends, clearly establishes the inconsistency between the positions that the defendants will likely take at trial. Gustafson suggests, as an alternative to disqualification of Walters, that in the event conflicts arise, he will retain additional counsel to conduct cross-examination of the former clients of Walters.

In connection with Mr. Walter's representation of the codefendants, both Bruins and Newstrum have refused to permit disclosure by Walters of any confidences and secrets reposed in him during his representation of them. They have expressly declined to waive any conflicts arising out of his past representation. The other six witnesses have submitted affidavits stating that they revealed no confidences to Walters during his representation of them. Three of those witnesses, Talbot, Williams and Johnson, assert that they were only called before the grand jury to produce documents. The other three witnesses, Hildreth, Lundberg, and McLean were apparently called before the grand jury to testify as to substantive matters. None of the affidavits purport to waive the attorney-client privilege between the witnesses and Walters.

Stephen Stein - Joan Norris

Attorney Stein currently represents defendant Joan Norris. He has previously represented her on unrelated matters. Additionally, he represented her during proceedings before a Las Vegas grand jury, during which Norris was subpoenaed to produce certain documents of defendant Agosto's corporations, including Production & Leasing, Ltd. (P & L), which produced and provided the Follies Bergere floor show for the Tropicana. The indictment alleges that P & L wrote hundreds of thousands of dollars worth of NSF checks on accounts at the Summit banks.

Norris is an employee of defendant Agosto, who owns a controlling interest in P & L. She has been employed by Agosto since she first moved to Las Vegas in 1976. By her own testimony, she is employed as an executive secretary to Agosto; the indictment also alleges that she is an officer of various corporations owned by Agosto.

Stein represented defendant Agosto in this matter at various times preceding the indictment. He has also represented him in other matters over the last six years, including proceedings before the Nevada Gaming Commission and the United States Immigration & Naturalization Service. Agosto is also represented by one of Stein's law partners, Jay Brown.

Stein also represented several other witnesses before the grand jury. The government intends to call these persons as witnesses at the trial.

Stein represented witness Nicholas Tanno when he appeared before the grand jury. Tanno was the general manager of the Tropicana during relevant times covered by the indictment. Stein arranged for immunity for Tanno in connection with his appearance before the grand jury.

In addition, Stein and Tanno have been social friends for five years. Tanno has submitted an affidavit in connection with this motion that states that no confidences were ever reposed in Stein in connection with his representation. The affidavit purports to waive any attorney-client privilege Tanno may have and states that there are no conflicts that could arise between Stein's current representation of Norris and his past representation of Tanno.

Stein also represented Harold Hug in connection with an effort by Hug to obtain immunity before an appearance before the grand jury. Hug was the comptroller of the Tropicana during times relevant to the indictment. According to a statement given by Norris to the FBI, Hug gave approval when Norris cashed large checks drawn on P & L accounts at the Tropicana casino cage, some of which created overdrafts on the P & L accounts. At the time Hug endeavored to discuss immunity with the United States Attorney's office, Stein was discharged from his representation of Hug because of the government's unwillingness to have Stein present during discussions. This unwillingness was due to Stein's then current representation of target Agosto.

Another grand jury witness represented by Stein is his law partner, Jay Brown. Brown apparently has represented or does represent Agosto on other matters. Brown submitted an affidavit in connection with this motion that asserts that no confidences were ever reposed by Brown in Stein during the course of the representation.

Stein also represented grand jury witness Mitzi Briggs Smith, a former co-owner, with defendant Gustafson of the Tropicana. Stein also represented the Tropicana during Smith's ownership. In connection with her appearance

before the grand jury, Stein arranged a grant of immunity for Smith. Smith's affidavit submitted in connection with this motion asserts that Smith reposed no confidence in Stein and purports to waive her attorney-client privilege.

Stein also represented grand jury witness Albert Bardier, P & L's public accountant. According to the government, Bardier reconciled the bank statements from the Summit banks. Stein also represented Bardier before a Las Vegas grand jury investigating Agosto's business concerns. Bardier's affidavit, submitted in connection with this motion, states that he has worked closely with Stein, representing both individuals involved in these proceedings and other mutual clients. Additionally, Stein and Bardier are social friends. Bardier states by his affidavit that he reposed no confidences in Stein and purports to waive his attorney-client privilege.

In a letter to the court dated December 8, 1981, and in her testimony on December 16, 1981, Norris represented to the court that she has reviewed all the foregoing affidavits and that Stein has advised her that no confidences were communicated to him by these individuals. With regard to codefendant Agosto, Norris represents that she understands the potential for conflict but believes that no confidences were ever reposed in Stein by Agosto. She then purports to waive any conflicts with the following language: "I am willing to waive any prejudice which may come to me from any possible conflict which could arise in the future [sic] during these proceeding [sic]. although I do not believe such will occur." Letter of Joan Norris, December 8, 1981.

In considering the actual or potential conflicts in Stein's representation of both Norris and Agosto, it is im-

portant to note that in a statement given to the FBI, Norris essentially stated that she acted at the direction of Agosto in relation to the allegedly unlawful transactions enumerated in the indictment. She denies any knowledge of wrongdoing and portrays Agosto as the only individual with the authority to authorize payment of bills and expenses. She stated that she could not write a check on P & L accounts without the prior approval of Agosto.

Arrangements are currently being made to obtain payment of Norris' legal fees by P & L. At the time she retained local counsel in Minnesota, Agosto advanced her the moneys for the retainer. It is unclear whether that money will be considered a personal loan to Norris or whether the corporation will reimburse Agosto.

Stanley I. Greenberg - Joseph Agosto

Attorney Greenberg currently represents defendant Agosto in these proceedings. He has represented Agosto in other matters, and also represented him in the preindictment stages of these proceedings.

In addition to his representation of Agosto, Greenberg represented defendant Norris in connection with her appearances before both the Las Vegas and Minnesota grand juries investigating Agosto. In addition, Greenberg represented grand jury witness Bardier in connection with his appearance before the Las Vegas grand jury.

Greenberg asserts that he and Stein discussed with defendants Norris and Agosto the representation of both of these defendants by the two attorneys. Greenberg represents that he and Stein discussed potential conflicts with Agosto and Norris and that these discussions were held "out of an abundance of caution. . . ." Statement of Stan-

ley I. Greenberg at 6. Greenberg states that the interests of Norris and Agosto are identical, that there is "no possibility that conflicting defenses will be presented . . .", and that neither Norris nor Agosto will plead gulity. *Id.*

In connection with this motion as it relates to Greenberg, Norris submits an unsworn statement in which she states she has reposed no confidences in Greenberg because she told the FBI essentially the same things she confided to Greenberg. She also states that, with regard to any confidential communication between herself and Greenberg, she waives her attorney-client privilege.

Greenberg has also submitted an unsworn statement by Bardier, P & L's certified public accountant. It recites that Bardier was represented by Greenberg in connection with his production of documents before the Las Vegas grand jury, that he had no confidential communications with Greenberg, and that he waives his attorney-client privilege with regard to Greenberg's representation.

Agosto submitted an unsworn statement in connection with this motion and was sworn and testified at the hearing on December 16, 1981. In Agosto's statement, he recites that he understands that Norris could refuse to answer questions at trial put to her by Greenberg because of his past representation of her. He states that he does not view this as a problem because of the identity of his and Norris' interests. He also states that he believes that he and Norris do not have inconsistent defenses and that neither he nor Norris intend to plead guilty. With regard to witness Bardier, Agosto states that Bardier had no confidential communications with Greenberg, and in any event that he waives any rights he may have in this regard.

At the December 16 hearing, Agosto testified that he

understood the pitfalls inherent in Greenberg's continued representation of him and wished to proceed in any event. He did not specify precisely what he understood those pitfalls to be.

Steven Kaplan - James Bacigalupo

Attorney Kaplan has represented defendant Baciagalupo both in the pre and post-indictment stages of these proceedings. Bacigalupo was the vice presendent and cashier of the St. Paul bank.

Unlike the other attorneys who are the subject of this motion, Kaplan has never represented any of his client's codefendants in this matter. During the grand jury investigation, he did, however, represent three bank employee witnesses in connection with their appearances. These employees will be called as government witnesses.

Of the three witnesses previously represented by Kaplan, the parties seem to agree that only the representation of Victoria Peterson presents any potential problem. Peterson was the bookkeeping supervisor at Summit National Bank during relevant times covered by the indictment. The government asserts that Peterson testified before the grand jury and informed the FBI that she had told Bacigalupo several years ago that the activity involving the P & L accounts amounted to a "check-kiting" scheme.

Bacigalupo has submitted statements from all three witnesses, including Peterson, which recite that any confidences reposed in lawyers from Kaplan's law firm were also communicated to the United States Attorney's office, the grand jury or the FBI. The statements also consent to disclosure of any confidences in connection with these proceedings.

Bacigalupo, by affidavits and testimony at the December 16 hearing, stated that he has reviewed all of Kaplan's law firm's notes and memoranda which are products of the representation of the three bank employee witnesses. He has stated that he believes there is nothing in those records to indicate his attorney will encounter any conflicts in his representation of Bacigalupo.

Bacigalupo's affidavit states his understanding of conflict of interest, the possible problems that could arise in Kaplan's representation, and his understanding of his sixth amendment right to effective assistance of counsel. He states that, notwithstanding any future conflict arising with these witnesses, he wishes to continue with present counsel. In his testimony, Bacigalupo indicated that he is aware of the substance of the testimony witness Peterson will give.

Sixth Amendment Right To Effective Assistance Of Counsel

Defendants Norris, Agosto and Bacigalupo have expressed a desire to waive their respective sixth amendment rights to effective assistance of counsel insofar as continued representation by their present attorneys impinges on those rights. Defendant Gustafson does not attempt to waive his sixth amendment right.

The sixth amendment guarantees a defendant assistance of counsel which is "untrammeled and unimpaired . . . ." *Glasser v. United States*, 315 U.S. 60, 70 (1942). This contemplates "the assistance of counsel free from conflicts of interest and abie to render independent judgment on behalf of his client." *United States v. Lawriw*, 568 F.2d 98, 101 (8th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978) (citation omitted).

In our circuit, dual representation of codefendants is not a *per se* violation of the sixth amendment. *See, e.g., id.; United States v. Williams*, 429 F.2d 158, 160 (8th Cir.), *cert. denied*, 400 U.S. 947 (1970). A showing is required of an actual conflict of interest or "evidence pointing to a substantial possibility of a conflict of interest . . . ."[1] *United States v. Lawriw*, 568 F.2d at 101. This standard takes into account the possibility of the manifestation of conflicts during trial, *id.* at 103, and it is recognized that the potential for prejudice in dual representation cases is "sufficiently pervasive that only a minimal showing of conflict should be required." *Id.* at 101-02.

The Eighth Circuit Court of Appeals requires that the trial court make a meaningful inquiry at an early stage of the proceedings in order to identify potential conflicts and explore them with the defendant, or alternatively, to record a knowing and intelligent waiver of the defendant's right to effective assistance of counsel. *See id.* at 104. In cases involving joint representation of codefendants, Fed. R. Crim. P. 44(c) requires:

> [T]he court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

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[1]The fact that counsel here are not seeking to currently represent more than one codefendant does not obviate the need for the Sixth Amendment inquiry necessary in this case. The dual representation of codefendants and witnesses during the preindictment stages of this matter clearly present potential hazards to the effective representation of the affected defendants.

A hearing has been held consistent with the requirements of *United States v. Lawriw* and Rule 44(c). With regard to each of the defendants involved, it is clear that there is a substantial possibility that conflicts of interest exist or will arise during the trial of this case.

Attorney Walters' representation of three of the principal defendants prior to the indictment presents major difficulties, not only with regard to cross-examination of the co-defendants, but also with regard to planning trial strategy, arguing the relative culpability of the defendants to the jury, and the questioning of other witnesses regarding these defendants' participation in the crimes charged. *See State v. Olsen*, 258 N.W.2d 898, 905 (Minn. 1977). The prior representation of what may be key government witnesses presents potential additional problems.

The same is true with regard to attorneys Stein and Greenberg. Their representation of both Norris and Agosto raises the same conflicts. Nor does the fact that Stein, Greenberg, Norris and Agosto discussed these matters and concluded that there is no adversity in their interests, erase the existing conflicts. Norris' statement to the FBI reveals the possible inconsistencies in Norris' and Agosto's defenses that may arise. It may well be that representation of Norris by an attorney with no connections to Agosto would result in a defense by Norris inconsistent with that presented by Agosto, or a greater responsiveness to government overtures regarding plea bargaining or immunity. The attorneys appear to be attempting to guarantee this court that no conflicts will arise between Norris and Agosto that would affect their ability to fully represent Norris and Agosto. This is not only unrealistic, but also raises questions about whose interests are being given priority - the attorneys or the clients.

With regard to Stein's representation of Norris, his past representation of Agosto in this and other matters, his law firm's ties to Agosto, and his continuing social and business ties with the government witnesses he has represented, all indicate a strong potential for a conflict of interest. The sixth amendment guarantees a defendant an "attorney devoted solely to the interests of his client." *United States ex rel. Hart v. Davenport*, 478 F.2d 203, 209 (3d Cir. 1973). Under these circumstances, it is clearly foreseeable that Stein could not fill that role.

There is also a potential conflict in attorney Kaplan's prior representation of government witness Peterson, who will apparently offer damaging testimony against defendant Bacigalupo. Kaplan could be precluded from attempting to impeach Peterson because of his attorney-client relationship with her which relates directly to her appearance in this matter.

The requisite showing of conflicts which impair the right to effective assistance of counsel has been made as to each defendant's attorney to which this motion is directed. Inquiry must then be made to determine whether there has been an adequate waiver of the sixth amendment right to counsel by these defendants.

Defendant Gustafson has expressly declined to waive his rights under the sixth amendment. Defendants Norris, Agosto and Bacigalupo, both through written statements submitted to the court and testimony at the December 16 hearing. have attempted to waive their right to effective assistance of counsel.

A defendant may waive any actual or potential conflict of interest which impairs his sixth amendment right to effective assistance of counsel, provided the waiver is made

knowingly and intelligently. *Holloway v. Arkansas*, 435 U.S. 475, 483, n.5 (1978); *Glasser v. United States*, 315 U.S. 60, 70 (1942); *United States v. Cox*, 580 F.2d 317, 320 (8th Cir. 1978); *cert. denied*, 439 U.S. 1075 (1979); *United States v. Lawriw*, 568 F.2d at 104.

Waiver is defined as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). To be effective, the waiver of a constitutional right must be done with "sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970) (footnote omitted). The determination of whether an effective waiver of the right to effective assistance of counsel has been made depends on "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. at 464.

That a waiver be knowingly made with an appreciation of its "likely consequences," *Brady v. United States*, 397 U.S. at 748, requires that the actual or potential conflicts be capable of definition at the time the waiver is attempted. *See United States v. Dolan*, 570 F.2d 1177, 1181 (3d Cir. 1978): *United States v. Dickson*, 508 F. Supp. 732, 734 (S.D.N.Y. 1981).

Application of these principles can result in disqualification of counsel in spite of a defendant's professed desire to proceed with particular counsel. *See United States v. Carrigan*, 543 F.2d 1053, 1058 (2d Cir. 1976) (Lumbard, J., concurring). *United States v. Lawriw*, 568 F.2d at 105, n.12 (citing *United States v. Garafola*, 428 F. Supp. 620 (D.N.J. 1977), *aff'd sub nom. United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978)).

In this regard, the *Garafola* court discussed the practical difficulty often encountered by the trial court in attempting to advise defendants in the face of potential conflicts and ascertain whether a waiver has been effected.

> The average defendant cannot possibly understand fully and completely the extent to which his counsel's trial strategy may be affected by his representation of other defendants.
>
> . . . [T]he trial judge cannot conduct a meaningful inquiry. He does not know the case. He cannot know the facts or the inferences which may be fairly drawn from them. He is unaware of the quality of the witnesses and the trial strategy the government and the defendants will pursue. Nor can he inquire into the defense without violating defendant's fifth and sixth amendment rights; and this is so whether the interrogation is held in open court or *in camera*. He is restricted to imparting vaguely contoured, abstract advice. . . . .

428 F. Supp. at 623, 624.

Nor does the fact that counsel has discussed potential conflicts of interest with their respective clients guarantee that a knowing and intelligent waiver has been made. In this instance, counsel have advised their clients that no conflicts exist or are likely to arise. Accordingly, the attempted waivers are premised on the defendant's belief that there will likely be no impairment of their rights to effective assistance of counsel. This cannot constitute a knowing and intelligent waiver as contemplated by *Johnson v. Zerbst* and *Brady v. United States. See In re Grand Jury Investigation*, 436 F. Supp. 818, 821 (W.D.

Pa. 1977), *aff'd by an evenly divided court*, 576 F.2d 1071 (3d Cir.) (en banc) (per curiam), *cert. denied*, 439 U.S. 953 (1978); *United States v. Garafola*, 428 F. Supp. at 624. Counsel is often in no better position to foresee potential conflicts which may arise at trial than is the court. *United States v. Carrigan*, 543 F.2d at 1058; *United States v. Garafola*, 428 F. Supp. at 625.

The instant case involves multiple defendants charged in numerous counts in an indictment detailing a sophisticated scheme involving the diversion of hundreds of thousands of dollars. Wtih regard to defendants Norris and Agosto, their alleged involvement in the charged acts appears to be inextricably intertwined. Some of the government's key witnesses were represented by attorneys Stein and Greenberg during the pre-indictment proceedings in this case.

The court did its best to explain to these defendants the dangers of joint representation. This explanation was defective because the court was not in a position to adequately advise them of all of the foreseeable prejudices simply because the court does not know them all and, at this early stage of the proceedings, could not reasonably predict them so as intelligently to advise defendants. In my view, defendants Agosto and Norris did not, and at this early stage probably could not, knowingly waive their sixth amendment rights. The Eighth Circuit Court of Appeals has recently highlighted its "great concern that 'knowing waivers' of important constitutional rights are not to be lightly found." *United States v. Unger*, No. 81-1005, Slip Op. at 10 (8th Cir. Dec. 8, 1981).

These defendants did not show a comprehension of the complex, subtle and unforeseeable dangers inherent in the

previous multiple representation by their attorneys. Each stated they wanted to waive their right to effective assistance of counsel. But their attempted waivers were a mere rote recitation of a desire to waive the conflict, and did not show a real understanding of the issues involved, the nature of the rights attempted to be waived, or the significance of the attempted waivers.

Norris did not truly waive any conflict of interest, but merely stated her view that no conflict existed, and that she had complete faith in her attorney whom she wanted to continue to represent her. Her attempted waiver was based on the mistaken belief that there were no confidential communications between Stein and his former clients and, if so, they were no longer protected because they had been made public.

Moreover, Norris' employer-employee relationship with Agosto requires a more exacting scrutiny of Norris' attempted waiver. Where such a relationship exists, an attempted waiver of the right to effective assistance of counsel is "likely a function in large part of one's natural hesitancy to alienate their employer rather than a product of a free and unrestrained will." *In re Grand Jury Investigation*, 436 F. Supp. at 821; *see United States v. Donahue* 560 F.2d 1039, 1044 (1st Cir. 1977); *United States v. Garafola*, 428 F. Supp. at 623-24. Despite Norris' protestations to the contrary, this court is unconvinced that such is not the case here.

Because of the substantial possibility that the interests of Norris and Agosto will diverge later in these proceedings, and the difficulty presented in defining the effect this will have on Stein's ability to effectively represent Norris, I find that no effective waiver of the right to effective

assistance of counsel has been made by Norris. Her attempted waiver is also rendered ineffective because of the problem of foreseeing the potential conflicts which have a substantial possibility of arising because of Stein's past representation of key government witnesses, together with his continuing business and personal relationships with several of these witnesses.

Agosto have voice to words of waiver, but he did not seem to have an understanding of the potential problems to be encountered by Greenberg's prior representation of codefendant Norris and witness Bardier. He testified that no conflict could arise because his position and that of Norris are the same. He stated that Greenberg's previous representation of Bardier created no problem because after talking to both Bardier and Greenberg, he understands there were no privileged communications between them.

The strong potential for conflicts arising out of Greenberg's representation of Agosto mandates the conclusion that no effective waiver has been made. The attempted waiver is premised on the belief that Norris will present a defense consistent with Agosto's. As with Norris, this does not evidence a waiver made with an appreciation of the "relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. at 748.

The conflict of interest problem as to defendant Bacigalupo and attorney Kaplan is the least egregious. Unlike the others, Kaplan has not represented other defendants in this case, and Fed. R. Crim. P. 44(c) is thus not directly applicable. The Code of Professional Responsibility is applicable, however, and the opinion of Michael Hoover, Director of the Minnesota Lawyers Professional Responsibility Board, correctly points out the con-

flict of interest occasioned by Kaplan's continued representation of Bacigalupo after having also represented three grand jury witnesses who are expected to testify in the case. Kaplan has stated to the court, however, that he is unaware of any limitation upon his ability to fully and effectively represent Bacigalupo and cross-examine these three witnesses. He will be held responsible for this representation. *See United States v. Garafola*, 428 F. Supp. at 626.

The potential conflicts presented by Kaplan's prior representation of the grand jury witnesses are capable of definition, and have been identified. The conflict that could potentially adversely affect Bacigalupo's defense is the testimony of witness Peterson. Bacigalupo has exhibited an understanding of his right to effective assistance of counsel, the conflicts presented by Kaplan's representation, and has effected an intelligent and knowing waiver of his rights.

Ethical Considerations

Even if Norris and Agosto could, and had, effectively waived their sixth amendment rights, they could not thereby give sanction to their attorneys' violations of the Code of Professional Responsibility, particularly where, as here, it does not appear "that there is good cause to believe no conflict of interest is likely to arise." Fed. R. Crim. P. 44(c); *United States v. Dolan*, 570 F.2d at 1183; *United States v. Flanagan*, Cr. No. 81-270 (E.D. Pa. Dec. 2, 1981).[2] Nor is Gustafson entitled to continued represen-

[2]Indeed, once a conflict of interest is found, and no effective waiver has been made, it is the attorney's duty to withdraw from representation. *United States v. Dolan*, 570 F. 2d at 1182-83.

tation by Walters if that representation violates the attorney's ethical responsibilities. The polestar here is the admonition from the Evangelist Matthew that "no man can serve two masters." Our rules of court, judical decisions, Code of Professional Responsibility and authoritative Standards of the American Bar Association recognize the wisdom, and effectuate the purpose, of the biblical injunction. And the reason for subscription to this principle is the evil of the alternative, that "you will love the one and hate the other; or hate the one and love the other."

And so here in a joint prosecution for fraud. it is almost inevitable that each defendant will claim innocence and point an accusing finger at the others. A lawyer having represented two such defendants in the case will find it impossible to independently and zealously represent the one, and at the same time keep the confidences and secrets of the other and all without giving the appearance of impropriety. *See* ABA Code of Professional Responsibility, Canons 4, 5, 7 and 9. A lawyer is prohibited from representing multiple clients having differing interests, as was done here, or where, as here, his independent professional judgment likely will be affected. *See* DR 5-105(A) and (B).

The relevant principles applicable in this instance are found in Canons 4, 5 and 9 of the Code of Professional Responsibility. I conclude that these relevant portions of the Code mandate the disqualification of attorneys Walters, Stein and Greenberg.

Canon 4 provides, "A lawyer should preserve the confidences and secrets of a client." Disclosure of confidences and secrets may be revealed only as provided for

in DR 4-101(C). DR 4-101(C) (1) applies in this instance, and permits disclosure only with full disclosure to and consent by the affected client. An examination of this record reveals, and the government aptly points out, that these attorneys take the position that *no* confidences were ever communicated to them by any of the individuals they previously represented. It is unnecessary to analyze these claims with regard to each individual represented by these attorneys; it is sufficient to note that the existence of an attorney-client relationship raises an "irrefutable presumption" that confidences were disclosed. *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 608 (8th Cir. 1977); *see United States v. Provenzano;* 620 F.2d 985, 1004-05 (3d Cir. 1980); *State of Arkansas v. Dean Food Products Co., Inc.*, 605 F.2d 380, 383-84 (8th Cir. 1979); Note, *Developments in the Law-Conflicts of Interest in the Legal Profession*, 94 *Harv. L. Rev.* 1247, 1329 (1981). Moreover, the protection of the confidential nature of the attorney-client relationship precludes this court from inquiring into whether confidences were imparted. *See Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d at 608.

The fact that confidences reposed in an attorney are disclosed in grand jury testimony or interviews with law enforcement personnel do not cause these communications to lose their protected status. The attorney in whom such confidences are reposed is still prohibited from disclosing such confidences except as provided in DR 4-101 (c) of the Code. *See* Note, *Developments in the Law, supra* at 1330.

The only inquiry then is whether there is a likelihood that confidences of former clients will be disclosed, and whether there has been a disclosure and consent sufficient

to satisfy DR 4-101(C) (1). Ethical Consideration 4-5 of the Code prohibits the use of a client's confidences to his disadvantage under any circumstances. *See United States v. FMC Corp.*, 495 F. Supp. 172 (E.D. Pa. 1980).

With regard to Walter's representation of Newstrum and Bruins, each of these defendants have expressly refused to permit the disclosure or use by Walters of any of the confidences reposed in him during that representation. Nor do the statements by any of the six government witnesses represented by Walters attempt to consent to any such disclosures.

Agosto and Norris also claim that no confidences were reposed in Stein and Greenberg during their prior representation of these defendants. Their attempted waivers of their privilege with regard to any confidences do not reflect a waiver based on full disclosure. Nor do the statements of the other government witnesses reflect consent after a full disclosure of their rights under the law and the Code of Professional Responsibility.

With regard to attorney Kaplan, he also takes the position that the witnesses he previously represented imparted no confidences in him. The only relevant confidences posing a potential problem pertain to witness Peterson's anticipated testimony regarding her statements to Bacigalupo that the P & L account activity amounted to a "check kiting" scheme. Because of the limited nature of the confidences disclosed to Kaplan in issue, he will be allowed to continue his representation of Bacigalupo.

Canon 9 of the Code of Professional Responsibility is closely linked with Canon 4. *State of Arkansas v. Dean Food Products Co., Inc.*, 605 F.2d at 385. Canon 9 provides, "A lawyer should avoid even the appearance of

professional impropriety." Clients of lawyers are entitled to expect that confidential disclosures will be maintained in confidence. This expectation is given force through the merger of the concern for the appearance of impropriety in Canon 9 and the protections afforded by Canon 4. *Id.* at 386.

Canon 5 of the Code of Professional Responsibility is also relevant to this discussion. It provides, "A lawyer should exercise independent professional judgment on behalf of a client." DR 5-105 specifically prohibits the acceptance or continuation of employment if the interests of another client may impair the independent professional judgment of the lawyer. A lawyer is required to decline or discontinue employment if it is likely to involve him in representing differing interests. DR 5-105(A) and (B). It is questionable whether attorneys Walters, Stein and Greenberg should have commenced the multiple representation of these individuals in the first instance. The likelihood of differing interests between the targets of a grand jury investigation, and between employer targets and employee witnesses is obvious.

The injunction against a lawyer serving multiple clients is even more emphatically stated in the ABA Standard Relating to the Defense Function, § 3.5.

> ". . . a lawyer should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear

> that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation."

The record here persuasively shows that there are conflicts of interest present and the strong likelihood that additional conflicts will arise in the future, particularly during trial. Even if it were possible for defendants Gustafson, Agosto and Norris to waive the conflicts and their rights, they have not done so.

It is first the obligation of counsel to recognize their duty under the law and the Code of Professional Responsibility. The court, early on, urged counsel to seek the authoritative opinion of Director Michael Hoover of the Minnesota Lawyers Professional Responsibility Board but counsel for defendants Gustafson, Agosto and Norris chose not to do so. Absent self-disqualification, the court must act to insure fair trial and constitutional rights of litigants and to preserve the integrity of members of its bar.

Because it is presumed that confidences were disclosed relating directly to this matter, and that no effective consents to disclosure have been made, Canons 4, 5 and 9 require the disqualification of attorneys Walters, Stein and Greenberg.[3]

On the basis of the files and hearings held and the foregoing expressions, which are denominated findings of fact and conclusions of law, the court DISQUALIFIES Joe

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[3]Gustafson's representation that he will retain additional counsel to participate in the trial with attorney Walters does not adequately protect Walters' former clients, nor does it rectify the appearance of impropriety existing because of Walter's prior representation of both codefendants and government witnesses. Gustafson has not waived his right to effective assistance of counsel, and he cannot waive his codefendants' attorney-client privilege. *See United States v. Siegner*, 498 F. Supp. 282 (E.D. Pa. 1980).

A. Walters, Stanley I. Greenberg and Stephen Stein from further representation of defendants Gustafson, Agosto and Norris in this action. Each of these defendants is directed to obtain and appear with qualified counsel before this court at 9:00 A.M. on January 11, 1982.

All other defendants and their counsel shall appear at the same time.

Dated: December 29, 1981.

/s/ Edward J. Devitt, Senior Judge
United States District Court

United States Court of Appeals
For The Eighth Circuit

No. 82-1057

United States of America,

Appellee,

v.

Joseph Vincent Agosto,

Appellant.

No. 82-1058

United States of America,

Appellee,

v.

Deil Otto Gustafson,

Appellant.

No. 82-1059

United States of America,

Appellee,

v.

Joan Lorrain Norris,

Appellant.

Appeals from the United States District Court for the District of Minnesota.

Submitted: February 9, 1982
Filed: April 9, 1982

Before Heaney, Stephenson* and Arnold, Circuit Judges.

Heaney, Circuit Judge.

On November 5, 1981, six defendants were named in a 32-count indictment charging mail fraud, wire fraud, misapplication of bank funds, false entries on bank records and conspiracy. The defendants were arraigned on November 6. On November 20, the government filed a motion for inquiry concerning possible conflicts of interest of certain defense counsel. After a hearing, the district court disqualified three defense counsel. The defendants represented by those three defense counsel, and one defense counsel appeal.[1]

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*The Honorable Roy L. Stephenson assumed senior status on April 1, 1982.

[1]In *In Re Multi-Piece Rim Products Liability Litigation*, 612 F.2d 377, 378 (8th Cir. 1980), *vacated sub nom. Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), we stated that an order granting a motion for disqualification was appealable under the collateral order doctrine. In vacating our decision on other grounds, the Supreme Court declined to express an opinion as to the appealability of disqualification orders. *Id.* at 372, n.8.

The Supreme Court in *Firestone* concluded that an order denying a motion to disqualify counsel was not appealable. Subsequent to *Firestone*, at least one court has held an order disqualifying a criminal defense attorney likewise nonappealable. *United States v. Greger*, 657 F.2d 1109 (9th Cir. 1981). However, also subsequent to *Firestone*, the Ninth and Fifth Circuits found the grant of a disqualification motion appealable in a civil case. *In Re Coordinated Pretrial Proceedings in Petroleum Productions Antitrust Litigation*, 658 F.2d 1355 (9th Cir. 1981); *Duncan v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020 (5th Cir.), *cert. denied*, 102 S.Ct. 394 1981). Prior to *Firestone*, several circuits had found orders granting disqualification in criminal cases appealable. *See e.g., United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978); *United States v. Duklewski*, 567 F.2d 255 (4th Cir. 1977); *United States v. Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975); *United States v. Garcia*, 517 S.2d 272 (5th Cir. 1975). We find no compelling reason to distinguish between civil and criminal cases as to appealability here, and agree with those circuits finding such an order appealable.

We affirm in part and reverse in part, and remand for further proceedings.

The indictment charged that the defendants used a check floating scheme to improperly obtain interest-free loans from Summit National Bank of St. Paul (Summit Bank-St. Paul) and Summit State Bank of Richfield (Summit Bank-Richfield) for the benefit of two business entities: the Tropicana Hotel and Country Club (Tropicana), a Las Vegas hotel and gambling casino, and Production and Leasing, Ltd. (P & L), a Nevada corporation that produced and provided the Folies Bergere floor show for the Tropicana.

The alleged participants in the scheme included:

(1) Deil Otto Gustafson, owner of a substantial interest in the Tropicana and owner of the Summit Banks.

(2) Joseph Vincent Agosto, owner of P & L.

(3) Joan Lorrain Norris, Agosto's executive secretary.

(4) Ralph Edwin Bruins, president of Summit Bank-Richfield and a consultant to Summit Bank-St. Paul.

(5) Roger Frank Newstrum, officer and employee of various Gustafson-owned companies, a corporate officer of the Tropicana, and a vice-president and director of the Summit Bank-Richfield.

(6) James Louis Bacigalupo, vice-president and cashier of Summit Bank-St. Paul.

The Tropicana allegedly received improper loans from Summit Bank-St. Paul by use of the bank as its depository bank for the Tropicana employees' federal withholding taxes. P & L allegedly did so by use of both banks as its depositories for federal taxes and by the opening of

commercial checking accounts. The Tropicana and P & L made deposits to these accounts in the form of nonsufficient fund (NSF) checks. The banks treated the deposits as good and used bank funds to pay the Tropicana and P& L taxes and other obligations. When the checks were returned as dishonored, the banks would accept new NSF checks to replace them. The replacement checks would in turn be replaced by other NSF checks and the process would continue until, upon the intervention of one or more of the defendants, the checks would be paid.

Each defense counsel represented only one defendant at the time of his disqualification. The district court's disqualification orders were based upon defense counsel's *earlier* representation of multiple defendants and grand jury witnesses who would likely be trial witnesses. The district court found that there was a substantial possibility that conflicts of interest existed or would arise during trial with regard to each defendant involved and that the defendants did not effectively waive their right to counsel unimpeded by conflicts of interest. The court concluded that disqualification was required both under prevailing case law and the Code of Professional Responsibility.

I

The district court is charged with the responsibility of supervising the members of its bar. *Cohen v. Hurley*, 366 U.S. 117, 123-124 (1961); *Coffelt v. Shell*, 577 F.2d 30, 32 (8th Cir. 1978); *Central Milk Producers Co-op v. Sentry Food Stores, Inc.*, 573 F.2d 988, 992 (8th Cir. 1978); *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 605 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978). Among the factors to be considered in exercising this re-

sponsibility are the ABA Code of Professional Responsibility,[2] the court's duty to maintain public confidence in the legal profession and its duty to insure the integrity of the judicial proceeding. In criminal cases, its power of supervision is guided by, and in some respects, limited by, a defendant's Sixth Amendment rights. *See United States v. Armedo-Sarmiento*, 524 F.2d 591, 592-593 (2d Cir. 1975).

The Sixth Amendment of the United States Constitution guarantees each defendant the "assistance of counsel for his defense." This guarantee includes the "right to 'the assistance of an attorney unhindered by a conflict of interest'." *Cuyler v. Sullivan*, 446 U.S. 335, 355 (1980) (Marshall, J., concurring in part and dissenting in part) (quoting *Holloway v. Arkansas*, 435 U.S. 475, 483, n.5 (1978)).

The Sixth Amendment also gives some protection to a criminal defendant's selection of retained counsel. As this Court stated in *United States v. Cox*, 580 F.2d 317, 321 (8th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979):

> In general defendants are free to employ counsel of their own choice and the courts are afforded little leeway in interfering with that choice. *United States v. Valenzuela, supra*, 521 F.2d at 416, *United States v. Garcia, 517 F.2d 272 (5th Cir. 1975); United States v. Wisniewski*, 478 F.2d 274, 285 (2d Cir. 1973).

Cf. Faretta v. California, 422 U.S. 806 (1975).

A facet of the right to counsel of choice is the defendant's ability to waive his right to the assistance of counsel

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[2]The Code of Professional Responsibility was adopted by the District of Minnesota pursuant to its Local Rule 1(c).

unhindered by a conflict of interest, provided that waiver is knowing and intelligent. *Holloway v. Arkansas, supra,* 435 U.S. at 483, n.5; *Glasser v. United States,* 315 U.S. 60, 70 (1942); *United States v. Lawriw,* 568 F.2d 98, 104 (8th Cir. 1977), *cert. denied,* 435 U.S. 969 (1978).

Thus, in assessing the merits of a disqualification motion, the court must balance:

> individual constitutional protections, public policy and public interest in the administration of justice, and basic concepts of fundamental fairness.

United States v. Garcia, 517 F.2d 272 (5th Cir. 1975).

Most conflict of interest issues in criminal cases are raised at the post-conviction stage, where the inquiry focuses on whether the defendant has made a showing of harm sufficient to require reversal of his conviction. *See, e.g., Cuyler v. Sullivan, supra,* 446 U.S. at 350 [no objection made at trial; the Supreme Court held the defendant must demonstrate that "an actual conflict adversely affected his lawyer's performance"]; *United States v. Lawriw, supra,* 568 F.2d at 101 [showing of actual conflict or evidence pointing to substantial possibility of conflict]; *United States v. Valenzuela,* 521 F.2d 414, 416 (8th Cir. 1975), *cert. denied,* 424 U.S. 916 (1976).

Here, we are concerned with the power of the district court to disqualify counsel *before* conflict results in ineffective assistance of counsel. At this stage in the proceedings, there is of necessity less certainty as to whether conflict will actually arise and as to the nature of those conflicts. This is particularly so where the government files a motion for disqualification early in the proceedings.

Because the task of assessing the potential for conflict well in advance of trial is such a difficult one, the standards applicable to making that assessment must be flexible. We find such flexibility in F. R. Cr. P. 44(c), which requires that in cases of multiple representation [where an attorney simultaneously represents two or more defendants], the district court shall conduct an inquiry prior to trial to determine the potential for conflicts of interest. Rule 44(c) provides in pertinent part that

> [u]nless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

The Advisory Committee Note, 77 F.R.D. 507, 600-601 (1978), states that

> Rule 44(c) does not specify what particular measures which will best protect each defendant's right to counsel may well vary from case to case.

Although this is a case of successive representation [where an attorney representing a defendant has previously represented codefendants or trial witnesses], we find that Rule 44(c) also establishes a suitable framework for the district court's exercise of responsibility in assessing possible conflicts here.[8] The goal of Rule 44(c) is the protection of the defendant's right to counsel. As we noted above, protection of that right extends to the selection of

[8]We apply only the last sentence of F. R. CR. P. 44(c) to this case of successive representation. We do not here decide that the remainder of Rule 44(c), which, *inter alia*, imposes an affirmative duty on the district court to hold a hearing on the possibility of conflicts, is applicable to all cases of successive representation.

retained counsel.[4] Thus, the chosen method for dealing with a potential conflict, in the absence of an acceptable waiver, is the one which will alleviate the effects of the conflict while interfering the least with defendant's choice of counsel.

Finally, this Court's scope of review is limited. As we stated in *Coffelt v. Shell, supra,* 577 F.2d at 32:

> In matters concerning the supervision of members of its bar, "the finding of the district court will be upset only upon a showing that abuse of discretion has taken place." *Fred Weber, Inc. v. Shell Oil Co., supra,* 566 F.2d at 605, quoting from *Hull v. Celanese Corp., supra,* 513 F.2d at 571. "Moreover, in the disqualification situation, any doubt is to be resolved in favor of disqualification." *Hull v. Celanese Corp. supra,* 513 F.2d at 571.

II

Thus, the first inquiry is whether there is good cause to believe that a conflict of interest is likely to arise. If so, the next inquiry is whether the district court made the appropriate response. Before assessing the potential for conflict, we examine the nature of the potential conflicts.

A major course of conflicts in both successive and multiple representation cases is the attorney's receipt of privileged information from a witness or codefendant.[5] Canon 4

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[4]The right to retained counsel of choice is not absolute, *see United States v. Cox,* 580 F.2d 317, 321 (8th Cir. 1978), *cert. denied,* 439 U.S. 1075 (1979), but must be protected if possible.

[5]Multiple representation presents greater possibilities of conflict than successive representation. The possibilities of conflict inherent in a case of multiple representation include:

> (1) in planning and executing trial strategy, the attorney may make decisions favoring one defendant over another;

of the Code of Professional Responsibility requires a lawyer to preserve the confidences and secrets of a client. Canon 5 requires a lawyer to exercise independent professional judgment on behalf of a client. When an attorney attempts to represent his client free of compromising loyalties, and at the same time preserve the confidences communicated by a Present or former client during representation in the same or a substantially related matter, a conflict arises.

In the successive representation situation, privileged information obtained from the former client might be relevant to cross-examination, thus affecting advocacy in one of two ways:

(a) the attorney may be tempted to use that confidential information to impeach the former client; or

(b) counsel may fail to conduct a rigorous cross-examination for fear of misusing his confidential information.

United States v. Jeffers, 520 F.2d 1256, 1264-1265 (7th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976). The second major possibility of conflict in the successive representation situation is that the attorney's pecuniary interest in possible future business may cause him to make trial decisions

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(2) the fact that an attorney appears on behalf of a group of defendants may make some defendants appear guilty by association;

(3) at the plea bargaining stage, the attorney's recommendation to each defendant might be affected by an assessment of the effect of the plea on the other defendant;

(4) in offering defenses at trial the attorney may harm one or more defendants. If he steers a neutral course he may deny the less culpable defendants the chance to blame other defendants. If he does attempt to implicate one defendant more heavily, he frustrates that defendant's right to effective assistance of counsel.

Developments in the Law-Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1381-1383 (1981).

with a view toward avoiding prejudice to the client he formerly represented. *Id.*

We turn now to a discussion of each attorney-client relationship to determine whether any of these conflicts is likely to arise.

Attorney Joe A. Walters

Mr. Walters represented defendant Gustafson until his disqualification. He represented defendant Bruins until his indictment, and defendant Newstrum until after his arraignment. He also represented six individuals in connection with their appearances before the grand jury; the government has represented that those six individuals will probably testify at trial.

(a) *Grand jury witnesses.*

The district court made no finding, and there is no evidence in the record to support a finding that attorney Walters may be motivated by pecuniary interests involving any of the six grand jury witnesses. The district court did, however, find a strong possibility of conflict on the basis of confidential information imparted to Walters during the course of his representation of the grand jury witnesses. The court relied upon an irrefutable presumption that confidences were disclosed, citing *United States v. Provenzano*, 620 F.2d 985, 1004-1005 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980); *Arkansas v. Dean Foods Products Co., Inc.*, 605 F.2d 380, 383-384 (8th Cir. 1979); and *Fred Weber, Inc. v. Shell Oil Co., supra*, 566 F.2d at 608. It did so notwithstanding the fact that all six grand jury witnesses represented by Walters submitted affidavits to the district court in which they stated that they did not consider their communications to Walters to be confidential.

In our view, the district court erred in applying the irrefutable presumption doctrine under these circumstances. The doctrine was developed primarily to protect the attorney-client privilege of a former client of the attorney whose disqualification was sought; to require the former client to prove that he made confidential communications to his attorney would result in destruction of the privilege. The doctrine is linked to the rule originated in *T. C. Theatre Corp. v. Warner Brothers Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953), proscribing the successive representation of clients with adverse interests where the matters are substantially related. This rule has been widely accepted by federal courts in civil cases, including this Court in *Fred Weber, Inc. v. Shell Oil Co., supra. See Developments in the Law-Conflicts of Interest*, 94 Harv. L. Rev. 1244, 1317 n.168 (1981) [hereinafter cited as *Developments-Conflicts of Interest*]. The irrefutable presumption doctrine should not be invoked as to a knowledgeable client who maintains that, in fact, no confidential communications were made. *See United States v. FMC Corp.*, 495 F.Supp. 172, 173 (E.D. Pa. 1980). The grand jury witnesses included a bookkeeper, three accountants and two secretaries. Each of these occupations requires considerable intelligence, and there is no evidence in the record that any of these witnesses lacked the ability to discern whether, in this particular situation, he or she had made confidential communications to Walters.

Furthermore, Walters submitted an affidavit in which he stated that his representation of the grand jury witnesses was essentially limited to assisting them in the assembly of documents and records subpoenaed by the grand jury, of advising them of their rights and obligations before the

grand jury, and of being available outside of the grand jury room during their testimony. He stated that at no time did the grand jury witnesses disclose information to him regarding themselves which they would consider confidential. Walters' description of his representation of these witnesses, as well as his statement that no confidential communications had been made to him by any of the six, lends credence to the knowledgeability of the witnesses' representation.* Courts generally give substantial weight to defense counsel's representations regarding conflicts of interest. *United States v. Cox, supra,* 580 F.2d at 322. *See Cuyler v. Sullivan, supra,* 446 U.S. at 347.

We hold that at most Walters' former representation of grand jury witnesses presents the very remote possibility of a conflict, insufficient to warrant the disqualification of defendant Gustafson's attorney of choice.

(b) *Codefendants.*

In connection with its motion for inquiry regarding possible conflicts of interest, the government submitted copies of statements given to the FBI by defendants Bruins and

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*There are at least two explanations for the willingness of the witnesses to state that no confidential communications were made. The more likely one here is that Walters' representation was of a limited, peripheral nature and that he, therefore, was in no position to acquire confidences. *See e.g., Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 756-757 (2d Cir. 1975). The second is that the interests of the grand jury witnesses are not adverse to those of the defendants. As stated in *Developments-Conflicts of Interest, supra,* 94 Harv. L. Rev. at 1324-1325:

> the only person likely to know and care about the breach of confidentiality is the former client, thus it may be expected that the issue will generally be raised only when the representations are adverse and the interests of the former client thereby threatened.

In this particular case, it would be difficult to assess the adversity of interests as between Gustafson and the grand jury witnesses prior to trial.

Newstrum. In those statements, Bruins and Newstrum indicated lack of knowledge of certain aspects of the alleged scheme.

The district court concluded that Gustafson, Bruins and Newstrum may take inconsistent positions with respect to culpability at trial. It cited the following possible conflicts which could arise should defendants take such inconsistent positions: (1) cross-examination of defendants Bruins and Newstrum, (2) planning of trial strategy, (3) arguing of relative culpability of defendants to the jury, and (4) the questioning of other witnesses regarding the defendants' participation in the crime charged. It concluded that the possibility that defendants may present inconsistent defenses was sufficient to require disqualification.

The duty of loyalty set forth in Canon 5 and the duty to preserve a former client's confidences set forth in Canon 4 combine here to create the potential communications from Bruins and Newstrum. *See, e.g., United States v. Provenzano, supra,* 620 F.2d at 1005; *Arkansas v. Dean Foods Products Co., supra,* 605 F.2d at 384-385; *United States v. Kitchin,* 592 F.2d 900, 904 (5th Cir.) (adopting district court's findings and conclusions), *cert. denied,* 444 U.S. 843 (1979). Furthermore, attorneys for both Bruins and Newstrum have indicated that their clients decline at this time to waive their attorney-client privilege.

In view of these facts and assuming that the defendants will take inconsistent positions at trial, the two-fold conflict noted in *United States v. Jeffers, supra,* is clearly a possibility: (1) Walters may be tempted to use confidential information to the detriment of his former clients, and (2) he may overcompensate and fall to cross-examine fully for fear of misusing confidential information. Thus,

two separate inquiries must be made: whether the potential danger to defendants Bruins and Newstrum requires disqualification by the court in the exercise of its responsibility to ensure compliance with ethical standards and insure the fairness of the trial, and whether the potential damage to defendant Gustafson endangers his right to effective assistance of counsel, so that disqualification is warranted to secure his Sixth Amendment protection as well as to enforce ethical standards. We turn to those inquiries.

(1) *Representation detrimental to Bruins and Newstrum.*

In civil cases, the general rule is that

> Confidential disclosures, actual or presumed, necessitate disqualification of the attorney when he represents an adverse interest in a related matter.

Arkansas v. Dean Foods Products Co., Inc., supra, 605 F.2d at 384-385. Disqualification may, however, be avoided where the former client consents to his attorney's subsequent representation of adverse interests. *Developments-Conflicts of Interest, supra,* 94 *Harv. L. Rev.* at 1333. *See* Proposed Final Draft of the Model Rules of Professional Conduct Rule 1.9 (May 30, 1981).

In the criminal context, disqualification on the basis of the attorney's receipt of privileged information from a co-defendant formerly represented by that attorney should only be considered upon a clear showing that the present and former clients' interests are adverse. Here, there has been no such showing. Gustafson, Norris and Agosto all contend that all of the defendants intend to present a joint defense, and that there, therefore, is no adversity of inter-

ests. While defendants Bruins and Newstrum are not on the record as joining in this contention, it appears that they were never asked to state their position. We find that the district court erred in rejecting appellants' assertion of intent to present a joint defense without conducting further inquiry into its validity. On remand, we direct that further inquiry take place.

Assuming that after further inquiry the district court is satisfied that a clear showing has been made that the interests of defendants Bruins and Newstrum are adverse to the interest of Gustafson, we instruct the district court to consider whether there exists a means of eliminating the potential conflict less burdensome than disqualification. As we noted earlier, a client may consent to his former attorney's representation of adverse interests. Gustafson contends that Bruins and Newstrum have no objection to Walters' continued representation, and proposes employment of a backup attorney to cross-examine Bruins and Newstrum and do whatever else would be necessary to alleviate the conflict should their interests ever prove adverse.[7] We note that Bruins and Newstrum never filed a motion for Walters' disqualification and never actively supported the government's motion. Under these circumstances, we hold that the district court should inquire of defendants Newstrum and Bruins as to their willingness to consent to Walters' continued representation of Gustafson, and use of backup counsel.[8] If Newstrum and Bruins

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[7]There is precedent for Gustafson's proposal. *See United States v. Jeffers*, 520 F.2d 1256, 1266 (7th Cir. 1975), *cert denied*, 423 U.S. 1066 (1976); *Tague, Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 Geo. L. J. 1075, 1115 (1979).

[8]If Bruins and Newstrum do consent, they will in effect waive any future objections they may have to the fairness of their trial arising as a result of Walter's continued representation of Gustafson and employment of backup counsel. Thus, in order for the consent to be effective, we hold that it should fulfill all the standards of a knowing and intentional waiver of a constitutional right.

are willing to consent, we see no reason to reject Gustafson's proposal to employ a backup counsel as a satisfactory resolution of the conflict. If they do not consent, however, and there is a clear showing of adverse interests,* then we concur in the district court's exercise of discretion and disqualify attorney Walters.

(2) *Failure to fully cross-examine for fear of misusing confidential information.*

The second potential for conflict is that attorney Walters may overcompensate and fail to fully cross-examine defendants Bruins and Newstrum for fear of misusing confidential information. Gustafson contends that employment of backup counsel to conduct cross-examination will effectively resolve the possibility of this conflict also. We are concerned, however, that after the trial of this case, should Gustafson be convicted, he may be moved to file a post-conviction motion alleging ineffective assistance of counsel because backup counsel did not have as full a degree of familiarity with the issues and facts as did Walters and, therfore, did not effectively cross-examine the witnesses. In conjunction with its further consideration of Gustafson's offer to employ backup counsel, should the court decide that Walters need not be disqualified on the basis of his former representation of Bruins and Newstrum,

*If the district court determines that the interests of the defendants are not adverse, it will only be because of the defendants, including Bruins and Newstrum, represent that they intend to present a joint defense and that there are, therfore, no conflicts of interest. Under these circumstances, we consider it appropriate to require Bruins and Newstrum to execute an informed consent to Walter's continued representation of Gustafson, and use of backup counsel if necessary. In this way, the interest of the district court in insuring the integrity of the proceedings from post-conviction attack will be protected should the defendants prove wrong in their assessment of trial strategy.

we instruct the court to require Gustafson to waive his right to effective assistance of counsel, insofar as that right may be impinged upon by Walters' conflicts of interest and the need to employ backup counsel to alleviate those conflicts.

Attorney Stanley Greenberg

Mr. Greenberg represented defendant Agosto until his disqualification, and defendant Norris in appearances before Las Vegas and Minnesota grand juries. He also represented one potential trial witness in connection with that witness's appearance before a Las Vegas grand jury.

(1) *Grand jury witness.*

Again the court relied upon the irrefutable presumption that the grand jury witness disclosed confidences to Greenberg. Again we hold that the district court erred in doing so.

The record includes statements by both Greenberg and the grand jury witness, Albert L. Bardier, a certified public accountant, that Bardier communicated no confidential information to Greenberg. Furthermore, the record reflicts that Greenberg's representation of Bardier was limited. Bardier was subpoenaed in his capacity as custodian of certain business records of P & L to produce a variety of documents before a federal grand jury in Las Vegas, Nevada. His testimony was limited to describing and authenticating the documents produced; he gave no substantive testimony at that time. He stated, and Greenberg affirmed, that Greenberg's representation was limited to advice concerning procedural aspects of the grand jury proceeding. Finally, Bardier stated that he was willing to waive his attorney-client privilege on cross-examination.

On the basis of this record, we see no reason to reject both sides' representations that no confidential communications were made by Bardier to Greenberg. Furthermore, in view of Bardier's willingness to waive the attorney-client privilege, we do not see even a possibility of conflict.

(2) *Representation of codefendant Norris.*

Greenberg represented defendant Norris in connection with her appearance before the Las Vegas federal grand jury. He also represented Norris for a portion of the pre-indictment period in this case; his representation of Norris ceased approximately four months before the return of the indictment.

The district court, in disqualifying Greenberg from representing defendant Agosto, again based its decision on the possibility that the defendants may take inconsistent positions with respect to culpability at trial, and that Greenberg's former representation of Norris will, therefore, create the same potential for conflict as noted above for defendant Gustafson. Unlike defendant Gustafson, who declined at this stage of the proceedings to waive his Sixth Amendment right to an attorney unhindered by conflicts of interest, defendant Agosto did attempt to make such a waiver. The district court found the waiver ineffective. It determined first of all that Greenberg advised his client that no conflict exists or is likely to arise, that accordingly Agosto's waiver was premised on his belief that there will likely be no impairment of his right to effective assistance of counsel, and that his waiver, insofar as it was based on counsel's advice, could not constitute a knowing and intelligent waiver.

We disagree. The record reflects that Greenberg made

as full a disclosure as possible under the circumstances of this case regarding possible conflicts."

The court in rejecting Agosto's waiver also held that counsel is often in no better position than is the court to foresee potential conflicts, citing *United States v. Carrigan*, 543 F.2d 1053, 1058 (2d Cir. 1976) (Lumbard, J., concurring), and *United States v. Garafola*, 428 F.Supp. 620, 625 (D. N.J. 1977), *aff'd sub nom. United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978), and that

> [t]he court did its best to explain to these defendants the dangers of joint representation. This explanation was defective because the court was not in a position to adequately advise them of all of the foreseeable prejudices simply because the court does not know them all and, at this early stage of the proceedings, could not reasonably predict them so as intelligently to advise defendants. In my view, defen-

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"In a statement filed with the district court, Greenberg represented that he advised Agosto of Norris's and Bardier's attorney-client privilege, and the ramifications of their invocation of that privilege in relation to Agosto's defense. He then stated:

> There appears to be very little concern on the part of any of the parties since the interests of Ms. Norris and Mr. Agosto appear to be identical to everyone who is familar with the facts of the case. However, out of an abundance of caution, I have identified and explored with both Mr. Agosto and Ms. Norris and her attorney certain possibilities, including the possibility that conflicting defenses might be presented, or that inconsistent pleas might be entered. I have further discussed the possibile impact of any conflicts in testimony or any arguments that might be raised with respect to differences in their respective degrees of involvement. We have also discussed possible differences in tactical considerations that may arise at trial, including the calling of witnesses, the interrelationship of defenses with other defendants, trial tactics involved in cross-examinating witnesses, and any strategies that may develop in connection with interrupting evidence during final arguments to the jury. As a result of these discussions, I believe that there is no possibility that conflicting defenses will be presented, and that neither Mr. Agosto nor Ms. Norris will move to vacate their previously entered pleas of not guilty.

dants Agosto and Norris did not, and at this early stage probably could not, knowingly waive their sixth amendment rights.

In the pretrial context, it is impossible to describe in full detail the conflicts which may arise during the trial. However, we reject the adoption of a per se rule that because of this fact, no defendant may make a knowing and intelligent waiver of his right to assistance of counsel unimpeded by conflicts of interest prior to trial. We conclude that in this case the nature of the potential conflicts has been sufficiently communicated to Agosto and he may, therefore, make a knowing and intelligent waiver. Furthermore, we have carefully examined the record and have concluded that defendant Agosto's waiver was knowing and intelligent. We, like the district court, question the advisability of Agosto's choice. However, he is fully capable of making that choice, and we have not been given adequate reason to reject it.

The sole remaining justification for disqualification is that Greenberg may represent Agosto to the detriment of Norris, breaching Canons 4 and 5 of the Code of Professional Responsibility, and that his disqualification is, therefore, an appropriate exercise of the district court's supervisory power. As we noted with respect to attorney Walters' former representation of defendants Newstrum and Bruins, a client may consent to his attorney's representation of adverse interests. We instruct the district court to inquire as to whether Norris will give a consent to Greenberg's representation of Agosto.[11] If she refuses, the

[11]Since we affirm the district court's disqualification of Norris's attorney, we point out that any inquiry of Norris as to her willingness to consent to Greenberg's continued representation of Agosto should be delayed until her new counsel is in a position to render her the appropriate advice.

district court should consider whether disqualification is warranted for this reason alone.

Attorney Stephen Stein

Stein represented defendant Norris until his disqualification. He also represented defendant Agosto preceding the indictment in this and other matters over the last six years. Finally, he represented five individuals in connection with their testimony before the grand jury. The government has represented that those five individuals will probably be called as witnesses at trial.

The conflict problems presented here differ substantially from those we have just discussed.[11] The primary loyalty of attorneys Walters and Greenberg has always been to the clients they now seek to represent—Gustafson and Agosto. Certainly, these attorneys' pecuniary interests lie in continued representation of those clients. Such is not the case with Stein, who has a long history of representation of defendant Agosto. Stein represented Agosto's interests on behalf of several corporations during the period of investigation leading to the instant indictment [on "procedural matters only"]. He also represented Agosto on certain civil matters over the past six years, on certain matters the Nevada Gaming Commission and on a dispute with the Immigration and Naturalization Service. He also represented the Tropicana for an extended period of time up to and including 1979. From the past and present pattern of representation, the long term pe-

[11]Here again, the possibility of conflict arising as a result of Stein's former representation of grand jury witnesses is highly remote and insufficient to warrant Stein's disqualification. Those witnesses stated that no confidential communications had been made, and that they had no objection to undergoing full cross-examination.

cuniary interests of Stein and of his law firm appear to lie with Agosto."

Stein represented to the district court, and to this Court, that he can put these conditions aside and represent Norris to the fullest. We have no reason to question Stein's good faith in making this representation; we are concerned, however, with the inherent difficulties in carrying it out.

The record does not reflect that Norris understood the possible consequences of Stein's divided loyalties. It is clear that Norris's understanding of possible conflicts was centered on the possibility of prior confidential communications between Stein and grand jury witnesses and codefendants, and not on the possibility of divided loyalties. Therefore, her waiver was not an effective one. Moreover, no arrangement has been proposed by which Stein can avoid the problem of divided loyalties and we cannot conceive of one. Norris is a secretary to Agosto and might have defenses very much in conflict with ones taken by Agosto. An irreconcilable conflict arises from one-time representation of Norris by a lawyer with well established loyalties to and prospective interests in representing Agosto. We, therefore, affirm the district court's disqualification of attorney Stein.

Judgment affirmed in part and reversed in part. The

"Although the record is not clear as to whether Stein currently represents defendant Agosto on unrelated matters, there is reference in the record to the fact that Stein's law partner does have a continuing relationship with defendant Agosto. Moreover, Norris testified that she will have difficulty even paying Stein's fees in the present matter. The inescapable appearance is that Stein's representation of her might be subsidized directly or indirectly by representation of Agosto on other matters.

case is hereby remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

United States District Court
District of Minnesota
Third Division

United States of America,

Plaintiff,

v.

Joseph Vincent Agosto, Deil Otto Gustafson, Roger Frank Newstrum, Ralph Edwin Bruins, James Louis Bacigalupo, Joan Lorrain Norris,

Defendants.

Cr. 3-81-96

Memorandum and Order

James M. Rosenbaum, United States Attorney, Douglas A. Kelley, Thorwald H. Anderson, Assistant United States Attorneys, Minneapolis, Minnesota, attorneys for plaintiff.

John R. Wylde, Minneapolis, Minnesota, attorney for defendant Agosto.

Joe A. Walters, O'Connor & Hannan, Minneapolis, Minnesota, attorney for defendant Gustafson.

Gordon G. Busdicker and Jerry W. Snider, Faegre & Benson, Minneapolis, Minnesota, attorneys for defendant Newstrum.

Joseph S. Friedberg and Mark W. Peterson, Minneapolis, Minnesota, attorneys for defendant Bruins.

Steven Z. Kaplan and James W. Littlefield, Briggs & Morgan, St. Paul, Minnesota, attorneys for defendant Bacigalupo.

Douglas W. Thomson, St. Paul, Minnesota, attorney for defendant Norris.

This matter is before the court for further proceedings in accordance with the Court of Appeals' instructions in *United States v. Agosto, et al.*, Nos. 82-1057-59 (8th Cir. April 9, 1982). That decision reviewed this court's order of December 29, 1981 disqualifying attorneys Stein, Greenberg and Walters from further representing defendants in this matter. That order was affirmed as to attorney Stein and remanded for further proceedings as to attorneys Walters and Greenberg. On May 10 and 11, 1982 further proceedings were held with regard to attorney Walters' further representation of defendant Gustafson.[1]

The facts of record at the time of the Court of Appeals' decision are set forth more fully in that court's opinion and this court's order of December 29, 1981. In brief, in addition to representing a number of grand jury witnesses

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[1]In regard to Greenberg's representation of defendant Agosto, the court remanded for the purpose of obtaining defendant Norris' consent to Greenberg's representation. Because Agosto has discharged Greenberg and local counsel, and this court has granted their motions to withdraw, no further proceedings are necessary.

in the preindictment stage of this case, attorney Walters represented codefendants Gustafson, Bruins and Newstrum. Some months prior to the indictment, Bruins retained separate counsel. Newstrum was represented by Walters until after his arraignment.

The Court of Appeals has directed this court to conduct further proceedings to determine whether Walters should be disqualified:

> In the criminal context, disqualification on the basis of the attorney's receipt of privileged information from a codefendant formerly represented by that attorney should only be considered upon a clear showing that the present and former clients' interest are adverse. Here, there has been no such showing. Gustafson, Norris and Agosto all contend that all of the defendants intend to present a joint defense, and that there, therefore, is no adversity of interests. While defendants Bruins and Newstrum are not on the record as joining in this contention, it appears that they were never asked to state their position. We find that the district court erred in rejecting appellants' assertion of intent to present a joint defense without conducting further inquiry into its validity. On remand, we direct that further inquiry be made.

Agosto, slip op. at 15.

To that end, this court conducted separate *in camera* hearings with defendants Bruins and Newstrum and counsel. *See* Fed. R. Crim. P. 44, Advisory Committee Notes (1979). The transcripts of the *in camera* proceedings are ordered sealed, and are not to be examined

or used for impeachment or for any other purpose by the government or any other party.

A thorough inquiry was made of Bruins and Newstrum regarding their intention to present a joint defense with defendant Gustafson. Both Bruins and Newstrum have declined to join in Gustafson's contention that all defendants intend to present a joint defense.[4] This court finds that a clear showing has been made that Bruins and Newstrum have interests in this matter that are adverse to those of Gustafson.[5]

Because we find that the requisite clear showing of adversity of interest has been made, it is then necessary to

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[4]Because of the sensitive constitutional problems that are presented by inquiry into the defenses of criminal defendants, *see United States v. Dolan*, 570 F.2d 1177, 1182, n.8 (3d Cir. 1978), we refrain from detailing the *in camera* discussions and leave examination of the record to the Court of Appeals on the appeal of this order.

[5]Although not necessary to support the clear showing made in the *in camera* hearings that the interests of Bruins and Newstrum are adverse to that of Gustafson, other facts of record cast doubt on the good faith and validity of Gustafson's assertion that a joint defense was intended in this case. According to affidavits filed by Douglas A. Kelley, the Assistant United States Attorney responsible for prosecuting this case, and Michael A. DeFeo, Deputy Chief of the Organized Crime and Racketeering Section of the Department of Justice, they attended a meeting with attorney Walters in Washington, D.C. on October 28 1981. According to these affidavits, at that meeting attorney Walters stated that Gustafson was not aware that the Tropicana Hotel or Production and Leasing Ltd. had accounts at the Summit State Bank of Richfield, and that Gustafson was never informed that checks from these entities were bouncing. Walters stated that the bank officers who bounced the checks called directly to Las Vegas or defendant Newstrum regarding bounced checks, and that Newstrum never talked with Gustafson about the problem. The affidavits further related that responsibility for these activities should be placed on the bank officers and ultimately the board of directors, a statement interpreted by government personnel to mean Bruins or Newstrum. At that meeting, Walters stated that he represented defendant Bruins, Newstrum and Gustafson. In actuality, Bruins had retained separate counsel a number of months prior to the October 28, 1981 meeting. Attorney Walters disputes the government personnel's interpretation of his statements. While it is not necessary for this court to resolve the dispute over Walter's intentions at this meeting, the statements made provide a cogent and disturbing example of the dangers inherent in multiple representation of grand jury targets.

consider "whether there exists a means of eliminating the potential conflict less burdensome than disqualification." *Agosto*, slip op. at 15-16. The Court of Appeals indicated that this court should inquire of defendants Bruins and Newstrum whether they are willing to consent to Walters' continued representation of Gustafson and to the use of backup counsel by Gustafson to conduct any cross examination of Bruins and Newstrum. *Id.* at 16. With regard to the nature of the consent required, the Court of Appeals stated:

> If Bruins and Newstrum do consent, they will in effect waive any future objections they may have to the fairness of their trial arising as a result of Walters' continued representation of Gustafson and employment of backup counsel. Thus, in order for the consent to be effective, we hold that it should fulfill all the standards of a knowing and intentional waiver of a constitutional right.

Id. at 16, n. 8. Both Bruins and Newstrum have emphatically declined to provide such consent. The Court of Appeals ruled that disqualification should follow: "If they do not consent . . . and there is a clear showing of adverse interests, then we concur in the district court's exercise of discretion and disqualify Walters." *Id.* at 16.

Immediately prior to this court's ruling on this matter following the *in camera* proceedings on May 10, 1982, attorney Walters argued for the first time that the Court of Appeals intended that severance be considered as a less restrictive alternative to disqualification. Because this issue had never been previously raised nor briefed, this

court permitted Walters to file a motion for severance raising this point.

Gustafson argues that severance must be granted merely because this court found that there has been a clear showing of adverse interests between Bruins and Newstrum and Gustafson. Simply because the defendants' positions can be said to be generally antagonistic or that one or more defendants may try to save themselves at the expense of the others, does not entitle Gustafson to a severance. *See United States v. Boyd*, 610 F.2d 521, 526 (8th Cir. 1979), *cert. denied sub. nom, Artez v. United States*, 444 U.S. 1089 (1980).

Gustafson next contends that severance is a less burdensome means of eliminating his attorney's conflict than disqualification. Gustafson argues that this court has no discretion to deny the motion because his Sixth Amendment right to choose a particular counsel is superior to any other interests favoring a joint trial. It is important to note that there has been no contention that joinder of these defendants and offenses is improper, and an examination of the indictment indicates that defendants and offenses are properly joined. *See* Fed. R. Crim. P. 8; *United States v. Sanders*, 563 F.2d 379, 382 (8th Cir. 1977, *cert. denied*, 434 U.S. 1020 (1978).

The threshold inquiry which must be made in considering this motion is whether severance will in fact eliminate Walters' conflict. The Court of Appeals found the source of the potential conflict in Canon 4 of the Code of Professional Responsibility requiring Walters to preserve his former client's confidences, and in Canon 5, requiring his loyalty to his former clients. *Agosto*, Slip Opinion at 14. In view of Walters' conflict, the danger is that

he "may be tempted to use confidential information to the detriment of his former clients . . . ." *Id.*

The conflict in this instance arises because Bruins and Newstrum are not committed to the presentation of a joint defense. The record indicates the likelihood that Gustafson's defense will be first, that no crime was committed, and secondly, that if criminal activity occurred, the culpable parties are other bank officers and directors. Bruins and Newstrum are the natural and obvious targets of such a defense.

In this court's opinion, that likelihood presents irreconciliable ethical problems for attorney Walters which have already been illustrated by the position he took at the preindictment conference with Justice Department personnel. Assuming that this court's duty to supervise the members of its bar, *Coffelt v. Shell*, 577 F.2d 30, 32 (8th Cir. 1978), is an insufficient basis to sustain a disqualification, *see Agosto*, Slip Op. at 5, it is necessary to examine the harm that may befall Bruins and Newstrum in the event of separate trials. *See id.* at 14-16.

The problem of the potential use of confidential information imparted by Bruins and Newstrum could arise in 1) cross examination of Bruins and Newstrum; 2) planning trial strategy; 3) arguing culpability of Bruins and Newstrum to the jury; and 4) examination of other witnesses regarding Bruins' and Newstrum's participation in the alleged offenses. *Id.* at 13. In the event Gustafson's case was severed and Gustafson was tried prior to Bruins and Newstrum, Bruins and Newstrum presumably would not testify at that trial. There remains the possibility, however, that confidential information imparted by Bruins and Newstrum would be used in planning trial strategy, and

examining other witnesses. Such use could elicit testimony at trial exculpating Gustafson and inculpating his codefendants. Evidence of this nature would surely be used by the prosecution in the subsequent trial of Bruins and Newstrum.

Trial of Bruins and Newstrum prior to Gustafson avoids the more obvious danger to these defendants in obtaining a fair trial. Walters would still be faced with the temptation to use their confidences in defending Gustafson. There could be the added problem of attempting to cross examine Bruins and Newstrum. The potential detriment to Bruins and Newstrum, while not affecting the disposition of their criminal case, could occur through the evidence that could be used in any civil proceeding against them brought in connection with their alleged criminal activities. Thus, a trial of Bruins and Newstrum prior to Gustafson eliminates neither Walters' ethical dilemma nor the strong potential of detriment to Bruins and Newstrum.

Gustafson argues that neither Bruins nor Newstrum have objected to Walters' representation of Gustafson in a separate trial. Both Bruins and Newstrum have emphatically declined to waive *any* privilege or right they may have that could be adversely affected by Walters' continued representation of Gustafson. That representation poses a real possibility of detriment to Bruins and Newstrum whether there be a joint or separate trials. Accordingly, we hold that a severance will not eliminate Walters' conflict.

Even if severance is viewed as a means of eliminating the conflict, it does not automatically follow that severance is required. The Sixth Amendment right to assistance of counsel provides some protection of the right to retain par-

ticular counsel. *Id.* at 5, citing *United States v. Cox*, 580 F.2d 317 (8th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979). This right to particular counsel is not absolute. *United States v. Green*, 630 F.2d 566, 568 (8th Cir.), *cert. denied*, 449 U.S. 904 (1980); *United States v. Davis*, 604 F.2d 474, 478 (7th Cir. 1979); *United States v. Ostrer*, 597 F.2d 337, 341 (2d Cir. 1979); *United States v. Kitchin*, 592 F.2d 900, 903 (5th Cir.), *cert. denied*, 444 U.S. 843 (1979); *United States v. Burton*, 189 U.S. App. D.C. 327, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); *United States v. Dolan*, 570 F.2d 1177, 1182-83 (3d Cir. 1978); *United States v. Vargas-Martinez*, 569 F.2d 1102, 1104 (9th Cir. 1978); *United States v. Poulack*, 556 F.2d 83, 86 (1st Cir.), *cert. denied*, 434 U.S. 986 (1977).

Gustafson argues that several cases support his contention that a severance must be granted to preserve his right to proceed with particular counsel. He contends that the holding in *United States v. Gougis*, 374 F.2d 758 (7th Cir. 1967) supports the view that severance should be granted in a multiple representation situation. Gustafson misperceives the holding in that case. There two codefendants were represented by one appointed counsel. The court reversed one defendant's conviction on the ground that he had been denied effective assistance of counsel. Another basis for the reversal was that the defendants were improperly joined under Fed. R. Crim. P. 8(b) because multiple defendants were charged and tried for offenses that were unrelated. This case provides no support for the proposition for which it is offered.

In *United States v. Mardian*, 178 U.S. App. D.C. 207, 546 F.2d 973 (D.C. Cir. 1976), the Court of Appeals

held that denial of a motion for severance was error where the defendant's attorney became ill and could not continue after two weeks of trial. The motion should have been granted because the defendant had made a "substantial pretrial showing of possible prejudice requiring severance under the *Kelly* doctrine." *Id.* at 979. *See United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965) *cert. denied*, 384 U.S. 947 (1966). More importantly, the severance motion should have been granted because the government did not oppose the motion. *Id.* at 980. Neither of these two factors is present in the instant case.

In *Case v. North Carolina*, 315 F.2d 743 (4th Cir. 1963), the Court granted habeas corpus relief to a defendant on the ground that he was denied effective assistance of counsel because he and his codefendant were jointly represented by one attorney. This violation of his Sixth Amendment right to effective assistance of counsel was occasioned by the trial court's refusal to grant a severance when the conflict was brought to its attention. This court disagrees that this case mandates severance in order to preserve a defendant's desire to proceed with a particular counsel. There has been no allegation nor any showing that Gustafson's right to *effective* assistance of counsel will be jeopardized in any way by a joint trial.

A motion for severance pursuant to Fed. R. Crim. P. 14 is addressed to the sound discretion of the trial court. *United States v. Boyd*, 610 F.2d at 525; *United States v. Jackson*, 549 F.2d 517, 523 (8th Cir.), *cert. denied sub. nom, Muhammad v. United States*, 430 U.S. 985, *Jardan v. United States*, 431 U.S. 923, *Hudson v. United States*, 431 U.S. 923, *Mims v. United States*, 431 U.S. 968 (1977). Severance will only be granted upon a showing of real

prejudice to an individual defendant. *Id.* In order to establish that this court has no discretion to deny a severance, a defendant must show it is necessary to insure a fair trial. *United States v. Boyd*, 610 F.2d at 525.

A trial is not automatically rendered fundamentally unfair by disqualifying particular counsel and requiring a defendant to proceed with new counsel. *See United States v. Lespier*, 558 F.2d 624, 629 (1st Cir. 1977); *see also, Paullet v. Howard*, 834 F.2d 117, 119 (3d Cir. 1980); *United States v. Poulack*, 556 F.2d at 86. Notwithstanding Gustafson's understandable preference to continue with counsel who represented him during the preindictment stage of this matter, he has made no showing that Walters is the only lawyer who could adequately represent him. *See United States v. Kitchin*, 592 F.2d at 904-05. Because the essential fairness of Gustafson's trial will not be impaired by denying severance, it is appropriate to evaluate other factors in considering this motion. *See United States v. Bridgeman*, 173 U.S. App. D.C. 150, 523 F.2d 1099, 1107 (D.C. Cir. 1975); *cert. denied*, 425 U.S. 961 (1976).

Weighing against Gustafson's desire to proceed separately to trial with a particular counsel is the policy favoring a joint trial of jointly indicted defendants, particularly in conspiracy cases. *See United States v. Jackson*, 549 F.2d at 525. There is a substantial public interest in joint trials in such cases. *See Parker v. United States*, 404 F.2d 1193, 1196 (9th Cir. 1968), *cert. denied*, 394 U.S. 1004 (1969). The burden on the government, on the judicial system, and on disinterested witnesses that would be occasioned by more than one trial in this case outweighs Gustafson's interest in proceeding with Walters as his at-

torney. *See United States v. Milham*, 590 F.2d 717, 722 (8th Cir. 1979); *See also* Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 Minn. L. Rev. 119, 144, n. 90 (1978). This is especially true in the instant case where the trial is predicted to be a lengthy one.

This court is charged with the duty to insure that the administration of justice proceed in a reasonably orderly and efficient manner. This goal is best served in this instance by a joint trial. Accordingly, we hold that severance is not a less restrictive alternative to disqualification of attorney Walters.

Summary

Based upon the foregoing, this court holds that there has been a clear showing of an adversity of interest between defendants Bruins and Newstrum and defendant Gustafson resulting in a conflict of interest for attorney Walters. Because Bruins and Newstrum will not execute informed consents to Walters' continued representation of Gustafson or to the employment of backup counsel, and because there are no less restrictive alternatives to disqualification, attorney Walters is hereby disqualified. Defendant Gustafson's motion for severance is DENIED.

Dated: May 17, 1982.

/s/ Edward J. Devitt
Edward J. Devitt, Senior Judge
United States District Court

United States Court of Appeals
For The Eighth Circuit

No. 82-1576

United States of America,

Appellee,

v.

Deil Otto Gustafson
Joe A. Walters,

Appellant.

No. 82-1577

United States of America,

Appellee,

v.

Deil Otto Gustafson,

Appellant.

Appeal from the United States District Court for the District of Minnesota.

Sumbitted: May 20, 1982

Filed: May 20, 1982

Before Heaney, Ross and Arnold, Circuit Judges.

Order

Tis appeal arises from a disqualification order entered by the district court[1] in a matter we previously reviewed. *See United States v. Agosto,* Nos. 82-1057-59 (8th Cir., April 9, 1982). The underlying facts were extensively set forth therein and may be summarized as follows. Attorney Joe Walters concurrently represented three individuals—Gustafson, Bruins and Newstrum—during a grand jury investigation of certain bank transactions. All three individuals are now codefendants and have retained separate counsel, but a potential conflict arises from confidential communications between Walters and defendants Bruins and Newstrum during the period of concurrent representation.

The district court disqualified Walters initially, but we remanded the matter for certain further findings. *See United States v. Agosto, supra.* Following such further hearing, the district court again disqualified Walters, which is the subject of this appeal. In requesting a stay of

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[1]The Honorable Edward J. Devitt, United States Senior District Judge for the District of Minnesota.

the disqualification order, Walters' briefs address the merits of the conflict issues and possible alternatives to disqualification. We also have carefully examined the full record of district court proceedings subsequent to our remand. We deny the motion for a stay and affirm the district court's disqualification order.

Following both open and *in camera* hearings with defendants Bruins and Newstrum, the district court ascertained that defendants Gustafson, Bruins and Newstrum have the potential for clearly adverse interests in this case. Bruins and Newstrum expressly declined to join in the assertion that the three co-defendants will present a joint defense. Defendants Bruins and Newstrum also refused to consent to or otherwise waive any claim relating to Walters' continued representation of Gustafson. This presents an irreconcilable potential conflict which the district court found would not be cured by severance of Gustafson from the joint trial. We agree. Bruins and Newstrum could be adversely affected if Gustafson could use, through his attorney, confidential communications obtained during the period of concurrent representation. The potential harm arises whether the defendants are tried jointly or separately. Because Bruins and Newstrum refuse to waive any claim they might have relating to such a possible conflict, there is no alternative available that is less burdensome than disqualification. We therefore affirm the district court.

A true copy.

Attest:

Clerk, U. S. Court of Appeals. Eighth Circuit.

Office-Supreme Court, U.S.
FILED
AUG 11 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2270

In the Supreme Court of the United States

OCTOBER TERM, 1982

DEIL OTTO GUSTAFSON and JOE WALTERS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the disqualification of petitioner Gustafson's attorney, petitioner Walters, because of a conflict of interest violated Gustafson's constitutional rights.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2270

DEIL OTTO GUSTAFSON and JOE WALTERS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. A-30 to A-52) is reported at 675 F.2d 965, and the opinion of the court of appeals after remand (Pet. App. A-64 to A-66) is not yet reported. The original opinion of the district court (Pet. App. A-1 to A-29) is reported at 528 F. Supp. 1300, and the opinion of the district court on remand (Pet. App. A-52 to A-63) is reported at 538 F. Supp. 1149.

STATEMENT

1.a. On November 5, 1981, a 32-count indictment was returned against petitioner Gustafson and five other individuals, charging them with mail fraud,

wire fraud, misapplication of bank funds, false entries on bank records, and conspiracy. In particular, the indictment charged that the defendants used a check floating scheme to obtain interest-free loans from Summit National Bank of St. Paul and Summit State Bank of Richfield for the benefit of two business entities: the Tropicana Hotel and Country Club—a Las Vegas hotel and gambling casino—and Production and Leasing, Ltd.—a Nevada Corporation that produced a floor show for the Tropicana (Pet. App. A-31 to A-32). Petitioner Gustafson owned the Summit Banks and held a substantial interest in Tropicana (*id.* at A-32).

b. Following the defendants' arraignment, the government, on November 20, 1981, filed a motion requesting the district court to conduct an inquiry into the possibility that petitioner Gustafson's attorney, petitioner Walters, had a conflict of interest (Pet. App. A-31).[1] During the grand jury investigation and until after arraignment, Walters, in addition to representing petitioner Gustafson, had represented co-defendant Roger Newstrum. The latter was an

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[1] The government also asserted that the attorneys for co-defendants Agosto (owner of Production and Leasing), Bacigalupo (vice president and cashier of the St. Paul Bank), and Norris (Agosto's executive secretary) also had conflicts of interest. The district court ordered the disqualification of counsel for Agosto and Norris, but not of counsel for Bacigalupo (Pet. App. A-8 to A-14, A-16, A-20 to A-22, A-23, A-26, A-28 to A-29). The court of appeals sustained the disqualification of Norris's attorney (*id.* at A-50 to A-51), but reversed the order disqualifying Agosto's attorney and remanded for further proceedings on this issue (*id.* at A-46 to A-50). Agosto subsequently discharged his attorney, however, thereby obviating any need for further proceedings on remand (*id.* at A-53 n.1).

officer and employee of various Gustafson-owned companies, and at various times was a corporate officer of Tropicana and vice-president and director of the Richfield Bank (*id.* at A-6). Until the return of the indictment, Walters also had represented co-defendant Ralph Bruins, the president and director of the Richfield Bank and a consultant to the St. Paul Bank.[2] The government asserted that Gustafson's defense at trial would conflict with that of co-defendants Bruins and Newstrum (*id.* at A-7).

Petitioner Gustafson submitted two affidavits with the court regarding the disqualification issue and testified at a hearing on December 16, 1981. Gustafson testified that he understood that due to Walter's prior representation of Bruins and Newstrum, Walters would not be able to cross-examine those defendants vigorously if they testified at trial, but that he was nonetheless willing to continue with Walters' representation (12/16/81 Tr. 13-14). The court then asked Gustafson whether he understood that if the government presented evidence of fraud, a conflict might arise because his co-defendants might well be inclined to cast the blame on others (12/16/81 Tr. 25-26). Gustafson admitted that he had not explored with Walters the various ways in which a conflict

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[2] In addition, during the grand jury investigation, Walters had represented six other Gustafson employees who either had been called as witnesses by the grand jury or had been interviewed by the F.B.I. The district court concluded that Walters' representation of Gustafson would conflict with the interests of these six witnesses as well (Pet. App. A-6, A-16, A-26), but the court of appeals reversed the disqualification order insofar as it rested on a finding of a conflict of interest resulting from Walters' prior representation of the witnesses (*id.* at A-39 to A-41). This issue therefore is not involved here.

might arise (*ibid.*), but stated that he was satisfied with Walters' continued representation (*id.* at 27). However, Gustafson declined to waive his Sixth Amendment right to the effective assistance of counsel (Pet. App. A-6).[3] Counsel for Bruins and Newstrum also informed the court that their clients would not waive their attorney-client privilege with Walters, which would have permitted Walters to cross-examine them without fear of betraying their confidences (12/16/81 Tr. 90-91).[4]

Based on this evidence, the district court disqualified Walters from further representation of Gustafson, finding that there was a substantial possibility that conflicts of interest existed or would arise during trial (Pet. App. A-16):

> Attorney Walters' representation of three of the principal defendants prior to the indictment presents major difficulties, not only with regard to cross-examination of the co-defendants, but also with regard to planning trial strategy, arguing the relative culpability of the defendants to the jury, and the questioning of other witnesses regarding these defendants' participation in the crimes charged.

The district court further held (Pet. App. A-28 n.3) that Gustafson's proposal to retain back-up counsel

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[3] Although Gustafson, in response to the court's questioning, indicated that he had signed a waiver of his Sixth Amendment rights (12/16/81 Tr. 26), Walters denied that Gustafson had executed any such waiver (*id.* at 30). Thereafter, Gustafson stated that he wished to defer for a short time a decision as to waiver (*id.* at 31-32).

[4] The district court had suggested that Walters consult with the Minnesota Lawyers Professional Responsibility Board regarding the ethical propriety of his actions, but he chose not to do so (Pet. App. A-28; 12/16/81 Tr. 5-6).

to conduct cross-examination of Newstrum and Bruins would not adequately protect Walters' former clients and eliminate the conflicts of interests it found.

2. The court of appeals reversed the district court's disqualification of Walters and remanded for further proceedings (Pet. App. A-39 to A-46). The court agreed with the district court that, in two respects, a possible conflict of interest existed in connection with Walters' representation of co-defendants Bruins and Newstrum. First, Walters might be tempted to use the confidences he had acquired from Bruins and Newstrum to their detriment. Second, Walters might overcompensate and fail to cross-examine Bruins and Newstrum fully for fear of misusing confidential information (*id.* at A-42 to A-46).

Turning to the first inquiry, the court found that disqualification of Walters was appropriate only upon a clear showing that the interests of his present and former clients were adverse. Because Gustafson had claimed that all the defendants intended to present a joint defense and that there was no adversity of interests, the court held that the district court had erred in rejecting this assertion without first questioning Bruins and Newstrum as to its validity. The court therefore directed the district court to determine whether the interests of Gustafson, Bruins, and Newstrum in fact were adverse; if the district court determined that they were, it was directed to inquire whether Bruins and Newstrum were willing to consent to Walters' continued representation of Gustafson, and to the use of back-up counsel (Pet. App. A-43 to A-45). As to the second potential area of conflict—the possibility that Walters might not fully cross-examine defendants Bruins and Newstrum for fear of disclosing or misusing confidential information

they furnished him—the court directed the district court on remand to require Gustafson to waive his right to effective assistance of counsel as a condition to his continued representation by Walters (*id.* at A-45 to A-46).

3. On remand, after conducting an in camera hearing with defendants Bruins and Newstrum and their counsel,[5] the district court disqualified Walters (Pet. App. A-63). The court noted that after a "thorough inquiry," both Bruins and Newstrum had declined to join in Gustafson's contention that all defendants intended to present a joint defense, and found that a "clear showing" had been made that Bruins and Newstrum had interests adverse to those of Gustafson (*id.* at A-55).[6] The district court further found that Bruins and Newstrum had "emphatically declined" to waive any privilege or right that might be adversely affected by such representation, including the use of back-up counsel (*id.* at A-56).

The district court also denied Gustafson's motion for a severance (Pet. App. A-63), finding that a severance would not eliminate the conflict of interest. The district court further concluded that severance would be inappropriate in any event. Because Gustafson's right to effective assistance of counsel would not be jeopardized by requiring Gustafson to proceed to a joint trial with new counsel, and in light of the fact that

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[5] The transcripts of the in camera proceedings were ordered sealed, and the government was not granted access to them (Pet. App. A-54 to A-55 & n.2).

[6] The district court noted that, quite aside from the clear showing made in the in camera hearing, the record cast doubt on the good faith and validity of Gustafson's assertion that a joint defense of all defendants was intended in the instant case (Pet. App. A-55 n.3).

the trial was expected to be a lengthy one, the court concluded that interests of judicial economy and the burden on disinterested witnesses outweighed Gustafson's right to be represented by counsel of his choice (*id.* at A-60 to A-63).

4. The court of appeals affirmed the disqualification of Walters (Pet. App. A-65 to A-66). The court found that given the "potential for clearly adverse interests" among Gustafson, Newstrum and Bruins and the refusal of Newstrum and Bruins to consent to or otherwise waive any claim relating to Walters' continued representation of Gustafson, an "irreconcilable potential conflict" existed (Pet. App. A-66). In this regard, the court observed (*ibid.*) that Bruins and Newstrum could be adversely affected if Walters used confidential information obtained during the period of concurrent representation and that this potential harm would arise whether the defendants were tried jointly or separately. Because Bruins and Newstrum refused to waive any claim that they might have based on the possible conflict, the court concluded that no alternative less burdensome than disqualification was available to alleviate the effects of the conflict (*ibid.*).

We have been informed by the Assistant United States Attorney handling the case that Gustafson has now retained new counsel to represent him at trial and that the new counsel already has participated in several pretrial matters. Trial of petitioner and his co-defendants is now scheduled for November 8, 1982.

ARGUMENT

Petitioners[7] claim (Pet. 11-20) that the district court's disqualification order violated Gustafson's constitutional right to proceed to trial with counsel of his choice.[8] However, on the facts of this case, in

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[7] Petitioner Walters does not allege in the petition any interest in the instant case distinct from that of his client that would make him a proper party to challenge the district court's disqualification order. The argument in the petition focuses on the rights of petitioner Gustafson to be represented by counsel of his choice. In their brief on appeal, however, Gustafson and Walters asserted (Br. 47 n.52) that the district court's order impaired Walter's interest as an attorney, protected by the Due Process Clause of the Fifth Amendment, in practicing his profession without arbitrary interference. They further argued (*ibid.*) that Walters had a related interest in vindicating his reputation, because allegations of impropriety were "arguably implicit" in the district court's order. We have considerable doubt that an interlocutory appeal by defense counsel in a criminal case is an apropriate means for counsel to vindicate his own interests, as distinguished from the interests of the defendant. Because Gustafson also is a party in this Court and petitioners' argument relates to Gustafson's interests, however, there is no need to consider this issue here.

[8] Although the government did not challenge the court of appeals' jurisdiction, the court of appeals held (Pet. App. A-31 n.1) that the order disqualifying Walters was immediately appealable pursuant to 28 U.S.C. 1291 under the collateral order doctrine. The court noted, however, that the Ninth Circuit had reached a contrary conclusion in *United States* v. *Greger*, 657 F.2d 1109 (1981), petition for cert. pending, No. 81-1357. As we have explained more fully in our Brief in Opposition in *Greger* (at 9-12), we believe there is considerable merit to the Ninth Circuit's holding that pre-trial orders disqualifying defense counsel are not immediately appealable pursuant to 28 U.S.C. 1291. Although this jurisdictional issue might warrant review at some point, we have not sought certiorari on this issue at the present time

which counsel's former clients have refused to waive their attorney-client privilege, the district court was entirely justified in ordering the disqualification of Walters. Further review therefore is not warranted.

1. a. Petitioners contend (Pet. 6, 8, 11, 19) that the order disqualifying Walters from representing Gustafson impermissibly interferes with Gustafson's right to counsel of his choice. However, the Constitution protects a defendant's decision to retain a particular attorney only against arbitrary interference (*Powell* v. *Alabama*, 287 U.S. 45, 69 (1932); *United States* v. *Flanagan*, No. 81-3116 (3d Cir. June 2, 1982), slip op. 7); it does not afford a defendant an absolute right to counsel of his choice irrespective of reasonable rules governing the conduct of criminal trials and the qualifications and ethical conduct of attorneys. That the Fifth and Sixth Amendments were not understood by the Congress that proposed them to support such an extreme position is confirmed by the First Congress' contemporaneous enactment of Section 35 of the Judiciary Act of 1789, ch. 20, 1 Stat. 92, now codified at 28 U.S.C. 1654. That section provided that parties in courts of the United States may manage their causes by the assistance of such counsel "as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein."

Surely, for example, a defendant does not have an absolute constitutional right to be represented by a

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in view of the pendency of *Morris* v. *Slappy*, No. 81-1095, (Mar. 29, 1982). One aspect of that case concerns the weight to be accorded a defendant's choice of a particular attorney, a question that the Ninth Circuit concluded in *Greger* had some bearing on whether a disqualification order is immediately appealable under the collateral order doctrine.

petition for cert. granted

lawyer who has not been admitted to practice before the court, cf. *Leis* v *Flynt*, 439 U.S. 438 (1979), an attorney who is implicated in the very crime in question, *United States* v. *Salinas*, 618 F.2d 1092 (5th Cir. 1980), or an attorney whose conduct in the case has been contemptuous, *United States* v. *Dinitz*, 424 U.S. 600, 603-605 (1976). It is equally clear, we submit, that a criminal defendant does not have a constitutional right to be represented by an attorney whose appearance in the case would violate ethical rules designed to preserve the integrity of the legal profession and the criminal justice system, and the public's confidence in that integrity.

b. Among these ethical rules is the established principle that a lawyer must preserve the confidences and secrets of a client, absent the client's consent to disclosure. ABA Code of Professional Responsibility DR 4-101 (1980). The requirement that an attorney preserve client confidences restricts the attorney's ability to represent one client in a matter where that client's interests are adverse to those of a former client. See ABA Comm. on Professional and Judicial Ethics, Formal Opinion No. 342 (1975), 62 A.B.A.J. 517-518 (1976). In order to ensure that a lawyer will not disclose the confidences of a client, the courts uniformly have held that a lawyer is disqualified from representing a party in litigation if he formerly represented an adverse party in the same or a substantially related matter, so that he may be in a position to disclose confidential information obtained in the course of the former representation or to utilize that information to the detriment of the former client. To require more—*i.e.*, a showing of what confidences actually were disclosed and how they might be affected by the lawyer's subse-

quent representation—would risk exposure of the very attorney-client confidences that it is the purpose of DR 4-101 and the disqualification rule to protect. 62 A.B.A.J. at 517 & n.6. See, *e.g.*, *Musicus* v. *Westinghouse Electric Corp.*, 621 F.2d 742 (5th Cir. 1980); *Trone* v *Smith*, 621 F.2d 994, 998-999 (9th Cir. 1980); *Westinghouse Electric Corp.* v *Gulf Oil Corp.*, 588 F.2d 221, 224 (7th Cir. 1978); *Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225, 235 (2d Cir. 1977).

The foregoing principles fully support the district court's disqualification order in this case. Walters' prior representation of Bruins and Newstrum was in connection with the very criminal matter in which he sought to represent Gustafson, and petitioners have not attempted to show that Walters in fact received no confidential information from Bruins and Newstrum relating to the instant case. The district court found, after a "thorough inquiry" into the matter on remand, that a "clear showing ha[d] been made that Bruins and Newstrum have interests in this matter that are adverse to those of Gustafson" (Pet. App. A-55). Moreover, both Bruins and Newstrum refused to waive their attorney-client privilege with Walters and thereby to consent to the possible disclosure or utilization of confidences by Walters in his representation of Gustafson. Indeed, although the transcript of the in camera proceedings was sealed and we therefore have not reviewed it, the district court stated that Bruins and Newstrum "emphatically declined" to consent to the representation of Gustafson by Walters and to the use of back-up counsel to conduct cross-examination of them (*id.* at A-56). In these circumstances, the court of appeals correctly affirmed the district court's disqualification order.

c. The ability of an attorney properly to represent a client in a matter in which he previously represented another client also is restricted by the attorney's overriding ethical obligation to "avoid conflicting representations" (*Cuyler* v. *Sullivan*, 446 U.S. 335, 346 (1980)). Established ethical rules provide that a lawyer may not represent several clients in a matter unless all consent *and* it is "obvious" or "clear" that he can adequately protect the interests of each. ABA Code of Professional Responsibility DR 5-105, EC 5-15 (1976), cited in *Cuyler* v. *Sullivan*, *supra*, 446 U.S. at 346 n.11; ABA, *Standards Relating to the Administration of Justice, The Defense Function* § 3.5(b), at 123 (1974). These rules plainly contemplate that counsel cannot ethically represent multiple criminal defendants with conflicting interests even if all give their consent, which Bruins and Newstrum have not done here.

This Court's promulgation of Fed. R. Crim. P. 44 (c) reflects the same view. That rule requires the district court to inquire into possible conflicts of interest in all cases of joint representation and to take "such measures as may be appropriate" to protect each defendant's right to counsel unless it appears that there is " good cause to believe no conflict of interest is likely to arise." The Note of the Advisory Committee on Rule 44(c) makes clear that disqualification of defense counsel is one of the appropriate measures available to the district court where there is not good cause to believe that the representation is likely to be free of conflicts of interest. The Note also makes clear that the district court may order such disqualification notwithstanding the defendants' desire to proceed with multiple representation. 77 F.R.D. 594, 600-603 (1978). See also *Developments*

in the Law: Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1394-1395 (1981).

In the present case, Walters had ceased to represent Bruins and Newstrum after indictment and arraignment. He therefore was not confronted with conflicts of interest resulting from continuing *joint* representation of several defendants, the situation to which Rule 44(c) is specifically directed. However, much the same potential for conflict of interest arises in a case such as this as in cases of active representation of several defendants. See, *e.g.*, *United States* v. *Young*, 644 F.2d 1008, 1012 (4th Cir. 1981). There is, of course, the potential for the misuse of confidences of the former client, discussed above. Moreover, the termination of Walters' representation of Bruins and Newstrum did not terminate his duty of loyalty to them with respect to the subject matter of the representation. Because the district court found that their interests were adverse to those of Gustafson, Walters' duty of loyalty to Bruins and Newstrum would be impaired by his representation of Gustafson. The result of such representation could be to undermine the confidence of the public in the integrity of the bar and, more specifically, to undermine the confidence of criminal defendants that their attorneys will not subsequently withdraw and assume an adversarial posture in the case. See *Trone* v. *Smith*, *supra*, 621 F.2d at 998-999; ABA Formal Opinion No. 342, *supra*, 62 A.B.A.J. at 518. Thus, especially in view of the refusal of Bruins and Newstrum to waive any claim arising out of the potential conflict, the district court properly disqualified Walters. *United States* v. *Vargas-Martinez*, 569 F.2d 1102 (9th Cir. 1978); compare *United States* v. *Partin*, 601 F.2d 1000, 1009 (9th Cir. 1979), cert. denied, 446 U.S. 964 (1980).

d. Petitioners err (Pet. 11-14) in contending that the court of appeals in effect adopted a per se rule requiring disqualification in all cases of successive representation. The decision below no more announces a per se rule against successive representation than Fed. R. Crim. P. 44(c) announces a per se rule against joint representation. The court of appeals made clear that such representation is permissible if the rights of all interested persons are fully protected, just as joint representation is permissible under Fed. R. Crim. P. 44(c) if all defendants' rights are protected. In applying that standard in the circumstances of this case, however, the court of appeals found that Walters' representation of Gustafson presented a serious and irreconcilable potential conflict with the interests of Bruins and Newstrum and ordered disqualification when the latter defendants declined to consent to the arrangement and waive any claims arising out of it. The court of appeals' resolution of this fact-bound issue does not warrant further review.

2. Petitioners argue (Pet. 7-9, 13-14, 16) that disqualification was inappropriate in this case because the conflict of interest was only "potential," not "actual." This assertion is erroneous. The district court found that "a clear showing has been made that Bruins and Newstrum have interests in this matter that are adverse to those of Gustafson" (Pet. App. A-55). Such a finding establishes an actual, not merely a potential conflict of interest. It is true that the court of appeals used the term "potential conflict" (Pet. App. A-65, A-66). But use of this term may reflect nothing more than the obvious fact that the trial has not yet occurred and that the court therefore could not be certain of the precise manner in which the interests of Gustafson, Bruins, and

Newstrum would be affected by Walters' representation.

The conclusion that Walters had an actual conflict of interest is confirmed by the ethical rule of automatic disqualification, discussed above (see pages 10-11, *supra*), in cases of successive representation where the lawyer has received confidences relating to the matter from a former client having adverse interests and the former client has not consented to the representation. This rule is premised on the view that the lawyer in such a situation has a disabling conflict of interest based on the *possibility* that he might be in a position to misuse the former client's confidences, even though the occasion for such misuse has not yet arisen and indeed even though the potential misuse might not actually occur.

We note as well that a trial court must resolve conflict of interest problems prior to trial, so that if substitute counsel is required, he may be retained sufficiently in advance of trial to permit him to become familiar with the case. Because the matter must be resolved prior to trial, the district court necessarily must base its actions in large part upon its informed prediction of how likely it is that a conflict of interest will materialize at trial. Fed. R. Crim. P. 44(c) recognizes this reality by requiring that the district court take appropriate measures (which may include disqualification) promptly, in advance of trial, in all cases where there is not good cause to believe that no conflict of interest is likely to arise; it does not permit the district court to wait until a conflict of interest has actually manifested itself at trial. Such pretrial measures are prophylactic in nature, designed to protect the defendants' right to effective assistance of counsel, to ensure that a conviction will not be vulnerable to collateral attack, to preserve the integrity of the

criminal justice system, and to ensure that defense counsel adhere to the standards of the profession barring conflicting representation. See Note of the Advisory Committee on Fed. R. Crim. P. 44(c), 77 F.R.D. at 603, quoting *United States* v. *Dolan*, 570 F.2d 1177, 1183 (3d Cir. 1978).

Accordingly, contrary to petitioner's contention (Pet. 13-14), a district court's ordering of disqualification in advance of trial because of the likelihood that a conflict of interest will arise is fully consistent with the requirement that in order for a court to set aside a conviction after trial on the basis of an asserted Sixth Amendment violation, the defendant must show that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1980).

3. Finally, petitioners contend (Pet. 15-20) that the district court abused its discretion in disqualifying Walters rather than resolving the conflict by permitting Gustafson to retain back-up counsel to conduct any cross-examination of co-defendants Bruins and Newstrum or by severing Gustafson's case from that of his co-defendants. The district court, however, properly rejected these alternatives.

Retention of back-up counsel to cross-examine Bruins and Newstrum would not have solved the ethical dilemma posed by Walters' prior representation of these two co-defendants. Such an arrangement would not ensure that Walters would not share confidential information with the back-up counsel, who could in turn utilize it in the course of cross-examination. The rules of the legal profession ordinarily require that where an attorney is disqualified, his partners and associates and other lawyers affiliated with him are disqualified as well, in part because of the presumption that confidences may be shared among affiliated lawyers. See ABA Code

of Professional Responsibility DR 5-15(D) (1980); *Novo Terapeutisk Laboratorium* v. *Baxter Travenol Laboratories, Inc.*, 607 F.2d 186, 196-197 (7th Cir. 1979) (en banc); *Gas-A-Tron of Arizona* v. *Union Oil Co.*, 534 F.2d 1322, 1325 (9th Cir.), cert. denied, 429 U.S. 861 (1976); *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 518 F.2d 751, 757 (2d Cir. 1975). The result should be no different, at least absent consent of the former client, where, as petitioners proposed here, the principal and back-up counsel would be associated for purposes of the representation of a client in a particular case.

Moreover, even assuming that in briefing back-up counsel, Walters did not disclose, either intentionally or inadvertently, confidential communications that he had acquired during his prior representation of the two defendants, the right of Bruins and Newstrum to a fair trial still might be infringed. This is so because Walters' knowledge of confidential communications detrimental to his two former clients could affect his conduct of other aspects of the trial. For instance, Walters' possession of any confidences and secrets detrimental to Bruins and Newstrom could impermissibly benefit Walters in any argument he made to the jury concerning the relative culpability of the defendants, or in his questioning of other witnesses regarding the defendants' participation in the offenses charged.

Nor could the conflict have been satisfactorily resolved by severing Gustafson's case from that of his co-defendants. As the district court found in rejecting Gustafson's severance motion (Pet. App. A-58 to A-59), if the cases were severed and Gustafson was tried prior to Bruins and Newstrum, Walters could use the confidential information imparted by Bruins and Newstrum in planning trial strategy and examining other witnesses, thereby possibly eliciting testi-

mony exculpating Gustafson and inculpating Bruins and Newstrum. Such evidence could be used by the prosecution in the subsequent trial of Bruins and Newstrum. Even if Bruins and Newstrum were tried prior to Gustafson, Walters could still be tempted to use their confidences in defending Gustafson. Although such use would not affect the outcome of Bruins and Newstrum's criminal case, it could be used in any civil proceeding brought against them in connection with their alleged criminal activities, or might otherwise be detrimental to their interests.

Moreover, as the district court further held, even if a severance were thought to eliminate the ethical conflict, petitioner Gustafson was not automatically entitled to a severance. If he were, this would afford powerful incentive to a defendant wishing but not otherwise entitled to secure a severance to retain counsel with a conflict of interest. Moreover, a severance motion is addressed to the sound discretion of the trial court. See *Opper* v. *United States*, 348 U.S. 84, 95 (1954); *United States* v. *Bright*, 630 F.2d 804, 813 (5th Cir. 1980). Requiring Gustafson to proceed to joint trial with new counsel will not render his trial unfair, and given the predicted length of the trial, considerations of judicial economy weigh heavily against severance. In these circumstances, the district court did not abuse its discretion in declining to order a severance.[9]

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[9] The cases upon which petitioner relies (Pet. 17) do not hold that a defendant has an absolute right to a severance in lieu of retention of new counsel where it appears prior to trial that the attorney has a conflict of interest. *United States* v. *Mardian*, 546 F.2d 973 (D.C. Cir. 1976), did not even involve the issue of a conflict of interest. In *United States* v. *Gougis*, 374 F.2d 758, 759-760 (7th Cir. 1967), the court reversed a conviction because court-appointed counsel for two defendants was shown to have had an actual conflict

Finally, any waiver by Gustafson of his Sixth Amendment right to the effective assistance of counsel would not have resolved the conflict. Whatever the merits of Gustafson's claim (Pet. 18-19) that he had an absolute right to waive any conflict that adversely affected his own right to the effective assistance of counsel, he could not waive the corresponding right of co-defendants Bruins and Newstrum to a fair trial and the confidentiality of information imparted to Walters.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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of interest, without reaching the defendant's argument that he was improperly joined under Fed. R. Crim. P. 8(b) because the offenses with which he was charged related to those of the other defendants. No issue of severance on conflict of interest grounds was raised. In *Case* v. *North Carolina*, 315 F.2d 743 (4th Cir. 1963), the court held that the defendant's Sixth Amendment right to the effective assistance of counsel was violated when the court declined to grant a severance of the trial of two defendants having conflicting interests who were represented by the same attorney. Gustafson does not assert that he will receive ineffective assistance from substitute counsel. Moreover, the court in *Case* did not suggest that it would have been improper to require the defendants to proceed to a joint trial represented by separate counsel to cure the conflict of interest, rather than granting a severance.

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